UNITED NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.456
6 February 1991

ORIGINAL: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-third session
29 April-19 July 1991

REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SECOND SESSION (1990)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-fifth session, prepared by the Secretariat

CONTENTS

	Paragraphs	Page
INTRODUCTION	1 - 5	9
TOPICAL SUMMARY	6 - 502	9
A. General comments on the work of the International Law Commission and the codification process	6 - 14	9
B. Draft Code of Crimes against the Peace and Security of Mankind	15 - 186	11
1. General comments	15 - 30	11
2. Comments on draft articles provisionally adopted by the Commission	31 - 68	16
Article 1. Definition	31	16
Article 2. Characterization	32	16
Article 4. Obligation to try or extradite	33	16

READEX FICHE

CONTENTS (continued)

	Paragraphs	Page
Article 5. Non-applicability of statutory limitations	34	16
Article 6. Judicial guarantees .....) Article 7. Non bis in idem .....)	35	16
Article 13. Threat of aggression	36	17
Article 14. Intervention	37 - 38	17
Article 16. International terrorism	39 - 48	17
Article 18. Recruitment, use, financing and training of mercenaries	49 - 54	19
Article X. Illicit traffic in narcotic drugs	55 - 68	20
3. Comments on draft articles submitted by the Special Rapporteur and referred by the Commission to the Drafting Committee	69 - 118	23
(a) Complicity, conspiracy and attempt	69 - 103	23
(i) General remarks	69 - 72	23
(ii) Draft article 15 (Complicity)	73 - 89	24
(iii) Draft article 16 (Conspiracy)	90 - 95	29
(iv) Draft article 17 (Attempt)	96 - 103	31
(b) International illicit traffic in narcotic drugs	104 - 115	33
(c) Breach of a treaty designed to ensure international peace and security	116 - 118	37
4. Question concerning the establishment of an international criminal jurisdiction	119 - 186	38
(a) General considerations	119 - 131	38

CONTENTS (continued)

	Paragraphs	Page
(b) Jurisdiction and competence	132 - 160	42
(i) Subject-matter	132 - 140	42
(ii) Competence and jurisdiction over persons .	141 - 144	44
(iii) Nature of jurisdiction	145 - 154	44
(iv) Submission of cases	155 - 160	47
(c) Structure of the court	161 - 176	48
(i) Institutional structure	161 - 165	48
(ii) Composition of the court	166 - 167	49
(iii) Election of judges	168 - 169	50
(iv) Organs charged with criminal prosecution .	170	50
(v) Pre-trial examination	171 - 172	50
(vi) Legal force of judgements	173 - 176	50
(d) Other questions	177 - 183	51
(i) Penalties	177 - 180	51
(ii) Implementation of judgements	181 - 182	52
(iii) Financing of the court	183	52
(e) Other possible international trial mechanisms .	184 - 186	52
C. Jurisdictional immunities of States and their property .	187 - 266	54
1. General comments	187 - 194	54
2. Comments on the draft articles provisionally adopted by the Commission on first reading or referred to the Drafting Committee in the course of the second reading	195 - 266	56
Part I. Introduction	195 - 199	56
Article 1. Scope of the present articles	195 - 196	56

/...

CONTENTS (continued)

		Paragraphs	Page
Article 2.	Use of terms	197 - 199	56
Article 3.	Interpretative provisions		
Part II.	General principles	200	57
Article 6.	State immunity	200	57
Part III.	[Limitations on] [Exceptions to] State immunity	201 - 244	57
Article 11.	Commercial contracts	205	58
Article 11 bis.	Segregated State property	206 - 210	58
Article 12.	Contracts of employment	211 - 223	59
Article 13.	Personal injuries and damage to property	224 - 229	62
Article 14.	Ownership, possession and use of property	230 - 232	64
Article 15.	Patents, trade marks and intellectual or industrial property	233	64
Article 16.	Fiscal matters	234	64
Article 17.	Participation in companies or in other collective bodies	235	65
Article 18.	State-owned or State-operated ships engaged in commercial service	236 - 239	65
Article 19.	Effects of an arbitration agreement	240 - 243	66
Article 20.	Cases of nationalization	244	67
Part IV.	State immunities in respect of property from measures of constraint	245 - 256	67
Article 21.	State immunity from measures of constraint	245 - 256	67
Article 22.	Consent to measures of constraint		
Article 23.	Specific categories of property		

CONTENTS (continued)

	Paragraphs	Page
Part V. Miscellaneous provisions	257 - 266	69
Article 24. Service of process	258 - 261	69
Article 25. Default judgement	262 - 263	70
Article 26. Immunity from measures of coercion	264	71
Article 27. Procedural immunities	265	71
Article 28. Non-discrimination	266	71
D. The law of the non-navigational uses of international watercourses	267 - 376	72
1. General comments	267 - 275	72
2. Comments on the work carried out by the Commission at its forty-second session	276 - 373	74
(a) Comments on articles 22 to 27 as provisionally adopted by the Commission	277 - 306	74
(i) General comments	277 - 285	74
(ii) Comments on specific articles	286 - 306	77
Article 22. Protection and preservation of ecosystems	286 - 289	77
Article 23. Prevention, reduction and control of pollution	290 - 294	77
Article 24. Introduction of alien or new species ...	295	78
Article 25. Protection and preservation of the marine environment	296 - 299	79
Article 26. Prevention and mitigation of harmful conditions	300 - 306	80
Article 27. Emergency situations		
(b) Comments on the draft articles proposed by the Special Rapporteur in his fifth report and in the first part of his sixth report	307 - 373	81

/...

CONTENTS (continued)

	Paragraphs	Page
Article 24. Relationship between navigational and non-navigational uses; absence of priority among uses	307 - 314	81
Article 25. Regulation of international watercourses)		
) 315 - 337	83	
Article 26. Joint institutional management)		
Article 27. Protection of water resources and installations	338 - 343	87
Article 28. Status of international watercourses and water installations in time of armed conflict	344 - 348	89
Annex I. Implementation of the draft articles	349 - 373	90
3. Other comments	374 - 376	95
E. State responsibility	377 - 409	97
1. General comments	377 - 386	97
2. Comments on the draft articles proposed by the Special Rapporteur in his second report	387 - 406	99
Article 8. Reparation by equivalent	387 - 396	99
Article 9. Interest	397 - 398	102
Article 10. Satisfaction and guarantees of non-repetition	399 - 406	103
3. The impact of fault on the forms and degrees of reparation	407 - 409	105
F. Relations between States and international organizations (second part of the topic)	410 - 438	105
1. General comments	410 - 417	105
2. Comments on the draft articles proposed by the Special Rapporteur in his fourth report	418 - 438	107
Article 1. Terms used	418	107

CONTENTS (continued)

	Paragraphs	Page
Article 2. Scope of the articles	419 - 421	107
Article 3. Relationship between the present draft articles (Convention) and the relevant rules of international organizations ...)	422 - 423	108
Article 4. Relationship between the present draft articles (Convention) and other international agreements .....)		
Articles 5 and 6	424 - 425	109
Article 7	426 - 430	109
Article 8	431 - 433	110
Article 9	434 - 435	110
Article 10	436	111
Article 11	437 - 438	111
G. International liability for injurious consequences arising out of acts not prohibited by international law	439 - 470	112
1. General comments	439 - 450	112
2. Comments on chapters and articles as proposed by the Special Rapporteur	451 - 467	115
Chapter I. General provisions	451 - 453	115
Chapter II. Principles	454	116
Chapter III. Prevention	455 - 459	117
Chapter IV. Liability	460 - 465	118
Chapter V. Civil liability	466 - 467	120
3. Question of liability for harm to the environment in areas beyond national jurisdiction ("global commons")	468 - 470	120

CONTENTS (continued)

	Paragraphs	Page
H. Other decisions and conclusions of the Commission	471 - 502	121
1. Programme, procedures and working methods of the Commission and its documentation	471 - 500	121
2. Cooperation with other bodies	501	128
3. International Law Seminar	502	128

INTRODUCTION

1. At its forty-fifth session, the General Assembly, on the recommendation of the General Committee, decided at its 3rd plenary meeting, on 24 September 1990, to include in the agenda of the session an item entitled "Report of the International Law Commission on the work of its forty-second session" 1/ (item 42) and to allocate it to the Sixth Committee.

2. The Sixth Committee decided to consider this item together with another item which the General Assembly had also decided to include in the agenda of the session and to allocate to the Sixth Committee, namely the item entitled "Draft Code of Crimes against the Peace and Security of Mankind" (item 140).

3. The Sixth Committee considered the two items at its 23rd to 39th meetings and at its 45th meeting, held between 29 October and 13 November and on 20 November 1990. 2/ At the 23rd meeting, the Chairman of the Commission at its forty-second session, Mr. Jiuyong Shi, introduced the report of the Commission. At the 45th meeting, on 20 November, the Sixth Committee adopted, under agenda items 140 and 142, draft resolution A/C.6/45/L.19, entitled "Report of the International Law Commission on the work of its forty-second session". The draft resolution was adopted by the General Assembly at its 48th plenary meeting, on 28 November 1990, as resolution 45/41.

4. By paragraph 16 of resolution 45/41, the General Assembly requested the Secretary-General to prepare and distribute a topical summary of the debate held on the Commission's report at the forty-fifth session of the General Assembly. In compliance with that request, the Secretariat has prepared the present document containing the topical summary of the debate.

5. The document opens with section A entitled "General comments on the work of the International Law Commission and the codification process". Section A is followed by seven sections (B to H), corresponding to chapters II to VIII of the report of the Commission.

TOPICAL SUMMARY

A. GENERAL COMMENTS ON THE WORK OF THE INTERNATIONAL LAW COMMISSION AND THE CODIFICATION PROCESS

6. Commenting generally on the background against which the work of the International Law Commission was being carried out, some representatives remarked that the development of international law was of utmost importance, particularly at

---

1/ Official Records of the General Assembly, Forty-fifth Session, Supplement No. 10 (A/45/10).

2/ Ibid., Sixth Committee, 23rd to 39th and 45th meetings.

a time when new avenues of international cooperation were opening up. In this connection one representative stated that the sterile confrontation between East and West had come to an end - and this would release energies for the benefit of all - that the opportunities for a new beginning in the dialogue between North and South had never been better and that there was a growing awareness that respect for and acceptance of international law lay at the very heart of an international order, as demonstrated also by the overwhelming support for the Decade of International Law. Also referring to the Decade, another representative recalled that the idea had originated in the Movement of Non-Aligned Countries.

7. Another aspect of the background to the Commission's current activities to which attention was drawn concerned the in-depth review undertaken by the Commonwealth - which represented a principal legal system and accounted for nearly a third of the membership of the United Nations - of its priorities and areas of concern. The Commission, it was stated, would benefit from a closer association with that aspect of the Commonwealth's activities.

8. A number of representatives emphasized the role of the International Law Commission in the development of international law. One of them said that his country had always had the greatest esteem for the Commission's work and had ratified almost all the multilateral conventions elaborated on the basis of drafts originating therein.

9. Several representatives stressed that the Commission's activities and the work relating to the Decade of International Law complemented each other. The remark was made in this connection that it came as no surprise that the international community should turn to the Commission in establishing the programme for the Decade. One representative observed that the work on the Decade would provide valuable contributions to the future endeavours of the International Law Commission and of the Sixth Committee, while others highlighted the role of the Commission in the achievement of the fundamental objectives of the Decade.

10. Tribute was also paid to the Commission for the activities it carried out in addition to its legislative work in the area of training by organizing seminars for postgraduate students and young professors of international law.

11. While agreeing that the Commission had been a successful institution from its very inception, some representatives observed that yesterday's success was no guarantee of tomorrow's influence. The remark was made in this connection that the Commission had reached a crucial juncture in its history, that the world around it had changed and that the world community had new needs and concerns. The Commission would have to adapt to those needs and concerns or it would lose its influence on rapidly evolving international relations. Another observation was that the Commission should not confine itself to reaffirming existing positive law but should also strive to adapt international law to the changes taking place in international society in order to help the international community to meet the many challenges which faced it.

12. In the view of some of the representatives in question, the moment was appropriate for taking steps in that direction. Reference was made in this

connection to developments on the international scene which created new opportunities for the Commission and would enable it to approach the progressive development of international law from a less ideological and more problem-oriented angle. It was also said in this context that the Decade which was beginning, and which was so important for international lawyers, offered a great opportunity to initiate the necessary changes, changes which could represent as valuable a contribution to the United Nations Decade for International Law as the formulation of new provisions of substantive law. Finally, the prospects for reform were viewed as encouraging as there was unanimity about the objective, which was to restore the Commission and the Sixth Committee to a central, effective and respected role in the legal work of the United Nations.

13. Those same representatives made specific suggestions aimed at facilitating the attainment of the above objective. These suggestions are reflected in section H below.

14. As for the work carried out by the Commission at its last session, it generally met with approval. One representative said in this connection that the report showed that both the Commission and the Secretariat had once again performed substantive and solid work and that, responding to General Assembly resolution 44/35, the Commission had succeeded in considering all the six topics in its current programme of work.

B. DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

1. General comments

15. Many delegations welcomed the progress achieved by the Commission on the topic at its last session. It was said in this connection that the Commission had reached a turning point in the development of the topic since it was now close to the completion of the first reading of the draft Code and that it was time to seek a consensus in the General Assembly by allaying the misgivings of some Member States. Satisfaction was expressed at the Commission's determination to give priority to the topic with a view to completing the first reading of the draft articles in 1991. Referring more specifically to the concrete results of the last session, one delegation noted with satisfaction that the three new draft articles provisionally adopted by the Commission dealt with three of the most insidious threats to the sovereignty and security of small States, namely, mercenarism, drug trafficking and international terrorism. This, another delegation remarked, represented a new and significant contribution towards the struggle against serious international crimes. The view was also expressed that the Commission deserved credit for the competence and expeditiousness with which it had responded to the request by the General Assembly on the question of establishing an international criminal court.

16. Several delegations also referred to the importance of the topic, to its relevance in view of the current international situation and to the usefulness of a codification and progressive development exercise in this area. Thus, one representative said that the Code's main purpose was to enhance international cooperation in the prevention of crimes most dangerous to peace and mankind as a

whole, and to ensure that those responsible for such crimes did not escape severe punishment. He added that the Code was needed as an effective instrument to be used in the joint efforts by States to prevent the preparation and waging of nuclear war, and to combat such crimes as aggression, apartheid, international terrorism and illicit traffic in narcotic drugs. The Code, it was also said, should become the cornerstone of the United Nations system for the maintenance of international peace and security, and thus of the international legal order, thereby leading to the establishment of a stable and peaceful world. One representative remarked that recent events in the Persian Gulf demonstrated all too clearly the relevance of the topic and that the catalogue of the international legal obligations which had been violated was endless. He emphasized that individuals were personally responsible for crimes of that nature, since the responsibility of the State, if there was such responsibility, was not in itself a sufficient response. Another representative stressed that although he had had doubts two years earlier regarding the usefulness of pursuing discussions in the Commission on the draft Code, those doubts had been alleviated by the presentation, by the delegation of Trinidad and Tobago in 1989, of the full political and legal dimensions of international drug trafficking. He further remarked that the Commission had in a short time presented significant factors to be considered with respect to the establishment of an international criminal jurisdiction to deal with such crimes and that the Achille Lauro hijacking, the Noriega case, the vast impact of the drug problem and the situation in the Persian Gulf prompted the idea that sanctions might at some point be applied not to States, but to government leaders, by courts along the lines of the Nürnberg Tribunal.

17. Referring to the draft Code in the context of the process of codification and progressive development of international law, one delegation pointed out that the document under elaboration was a valuable reference instrument, as it expressed the teachings of the most highly qualified publicists of the world's different legal systems and schools, and could as such already be applied by the International Court of Justice, whose Statute stipulated, in Article 38, paragraph 1, that the Court shall apply "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

18. Reservations were on the other hand expressed on the work carried out so far by the Commission on the topic. One representative, after stressing that the exercise should be considered in the light of its costs and anticipated benefits, pointed out that the key to determining the Code's potential usefulness was its acceptance by the international community and that the Commission's work on the topic at its forty-second session merely confirmed his delegation's conviction that, as it was now being shaped, the Code would not command the acceptance required. He remarked that although international agreement existed on many of the acts covered by the draft, for example, aggression by States in violation of the Charter of the United Nations, the difficulty consisted in transforming general agreement about how States should behave into specific criminal provisions designed to regulate the acts of individuals. While acknowledging that, as evidenced by recent events in the Persian Gulf, the international community would doubtless agree that certain acts of individuals in connection with State aggression were violations of international law, he pointed out that article 12 of the draft Code went beyond defining such acts and, as a result, was too vague to command

international agreement. He drew attention to a similar problem in connection with other provisions, such as those on drug trafficking and international terrorism. According to his delegation, there was a large gap between the general abhorrence at those acts and the specific and detailed provisions needed in a criminal code, and the Commission had so far failed to bridge it. He further emphasized that States did not seem to agree as to which acts should be dealt with in a universal code rather than through specific international conventions, national laws and agreements on enforcement. While recognizing that by drawing upon specific provisions from existing instruments the Commission might avoid certain difficulties, he warned that the procedure might run the risk of disturbing the consensus already achieved and thus prove actually dangerous. Although he did not mean to imply that a code of international crimes could never be drafted, or that specific international crimes on which international consensus might be achieved could not be identified, he felt that the attempt to codify the whole field of international criminal law was over-ambitious and premature, and therefore urged the Commission once again to spend its time on more useful endeavours.

19. Another representative similarly criticized the manner in which the Commission had been compiling a list of international crimes for the proposed Code. He recalled that, while the terms of reference made it clear that the offences involved were crimes against the peace and security of mankind, his country had from the beginning considered that the concept referred to the most reprehensible of the crimes committed during the Second World War. Without wishing to cast doubt on the serious nature of the crimes currently covered by the draft Code, his delegation continued to have difficulty envisioning how the existing series of legal and political instruments, including declarations, resolutions and conventions, could be merged into a single code of crimes against the peace and security of mankind. Starting from the premise that crimes must be included in the draft on the basis of their being universally accepted as crimes against mankind, he feared that characterizations made in general terms or by reference to documents of a political character intended to serve political organs did not necessarily accord with such a concept, and that their transposal to a jurisdictional body might lead either to their non-applicability or to selective applicability through politically oriented considerations. As an illustration, he drew attention to what he viewed as loopholes in two of the articles provisionally adopted by the Commission, article 12, on aggression, and article 14, on intervention. He stressed that while those articles might well have responded to the political demands of some Member States, they could, as a basis for implementation in the context of an international criminal jurisdiction, raise very serious questions of applicability, as well as of compatibility with article 3, which dealt with responsibility for crimes irrespective of motive. He concluded that until such time as a code was produced which could be universally accepted as a legally substantive basis for an international criminal jurisdiction it would be difficult, if not impossible, to consider the establishment of an international criminal court which could adjudicate on the basis of such a code.

20. A number of representatives reviewed the specific elements which the future Code should comprise. Those elements were described as being: (1) a definition of the offences in accordance with the principle nullum crimen sine lege; (2) an indication of the penalties in conformity with the principle nulla poena sine lege; and (3) a judicial organ to implement the system.

21. As regards point (1), comments focused on whether the definition should be synthetic or take the form of a list, on the degree of gravity of the acts to be covered and on the question whether the list should be exhaustive or illustrative.

22. Some representatives felt that it would be worthwhile to include in the Code an overall definition of the wrongful act, following the model of article 19 of the draft on State responsibility which set the criterion of seriousness in a more conceptual scope; in their view, the current structure, in which wrongful acts were described in separate provisions, underlined the need for a specific definition of the notion of gravity.

23. As regards the degree of gravity of the acts to be included in the Code, there was general agreement that only the most serious crimes which threatened the fundamental interests of the international community should be covered. Attention was drawn in this context to the need to observe the distinction between international crimes and delicts established in the draft articles on State responsibility, a distinction which, it was noted, would be of vital importance when dealing with complicity, conspiracy and attempt.

24. On the question whether the list of offences should be exhaustive or illustrative, some delegations favoured the first alternative, taking into account the principle nullum crimen sine lege. One representative however felt that the list should be regarded as non-exhaustive and thus subject to future expansion.

25. Some delegations made specific proposals regarding the list of crimes to be covered. Some suggested that the Code should characterize as a crime against the peace and security of mankind the deliberate refusal by a State to respect and implement the binding decisions of the Security Council aimed at putting an end to an act of aggression and its illicit consequences. It was noted in this respect that some situations where international peace and security were at stake existed because the relevant Security Council resolutions were not universally respected. Attention was also drawn to violations of the principles of international law, particularly the principles laid down in the Charter of the United Nations, as well as to cases of disregard for the judgments of the International Court of Justice. Other acts which were mentioned included genocide and the dumping of nuclear and hazardous waste in the territories of other States.

26. As regards the second of the three points referred to in paragraph 20 above, one representative stressed that the planned instrument should contain, on the lines of criminal law, a preventive dimension and a punitive dimension, and that the Code would therefore be incomplete if it did not stipulate the punishments applicable to the crimes which it covered.

27. As regards the third of the points referred to in paragraph 20 above, several representatives placed special emphasis on implementation concerns. Thus, one representative said that in the preparation of any new Code the underlying principle should be its applicability. He remarked that articles that might be inapplicable would have a negative impact on the applicability of the instrument as a whole and emphasized that in preparing a code every effort should be made to keep politics and law separate so as to achieve a high degree of applicability without

regard to the elements of time and location. Stressing the need for a mechanism aimed at ensuring the effective implementation of the Code, another representative pointed out that unless the international community was ready to accept such a mechanism it was not advisable for the Commission to engage in drafting an international code for the punishment of perpetrators of acts which constituted crimes against the community as a whole. He urged the Commission, assuming it had to continue working on the topic, to proceed with the greatest caution, bearing in mind the need to formulate rules that would be truly meaningful in a world which had undergone tremendous changes since the immediate postwar era, when it had first embarked upon the consideration of the topic. Still another representative pointed out that criminal justice had thus far depended on the strength, organization and legitimacy of the State attributes which did not necessarily have equivalents in international society and that nothing would be worse than to establish a system which had not been adequately studied and which, instead of strengthening the repression of the most heinous crimes, created confusion and undermined the concept of international justice. He suggested that in analysing precedents and doctrine, particularly as developed between the two world wars, the Commission should be able to shed light on the complex issues involved.

28. Other remarks concerning the contents of the draft Code included, on the one hand, the remark that greater space should be given to the question of State responsibility, particularly with regard to crimes against peace, which were usually committed by States, as well as to certain crimes against humanity, such as genocide and apartheid, and, on the other hand, the suggestion that a provision be included whereby it would be clearly stated that the right of asylum could not be invoked by a person accused of perpetrating a crime against the peace and security of mankind.

29. Several representatives commented on methodological aspects. As regards the sources to be utilized by the Commission on its work on the topic, one representative said that the difficulties to which that complex political issue gave rise could be resolved by recognizing international conventions as the primary source for the identification of international crimes, thereby avoiding a number of issues relating to the binding nature and enforceability of the legal sources invoked, such as custom and general principles. In his view, it was therefore essential for the Commission to rely on conventional international law as a basis for developing a theory in order to achieve legal certainty, without forgetting however that there had never been a definitive list of international crimes, nor had there ever been a conclusive theory as to the definition of an international crime. Another representative pointed out that in the final version of the draft Code there should be a better balance between articles, so as not to create the impression that the list of crimes against the peace and security of mankind had been drawn up according to varying criteria. He remarked in this connection that, as currently drafted, some articles contained fairly detailed definitions, while for others, definitions were given only in the commentary.

30. A further point on the structure of the draft was that consideration should be given to addressing, in the section on general principles, the question of the applicability of the concept of mens rea to all crimes under the draft Code in order to avoid having to deal with that question in relation to each crime.

Finally, the remark was made that the Commission had departed from the traditional approach, whereby specific conduct was classified in terms of the distinction between active and passive subjects of the criminal act. By way of illustration, it was pointed out that the articles that were before the Sixth Committee included lists of acts without actually defining the crime: article 16, for instance, referred to "the undertaking, organizing ... by the agents or representatives," etc., without however defining the specific acts. The suggestion was made that a wording such as the following would be preferable: "An international terrorist is any person who undertakes, organizes, assists ..."

2. Comments on draft articles provisionally adopted by the Commission

Article 1. Definition

31. One delegation was of the view that the bracketed words "under international law" should be included in the text, because crimes against the peace and security of mankind were in fact crimes under international law - an interpretation which was confirmed by the wording of article 2.

Article 2. Characterization

32. One delegation expressed support for the draft article and disagreed with those members of the Commission who felt that the second sentence was not strictly necessary.

Article 4. Obligation to try or extradite

33. One representative stated that his country would be unable to accept the article unless the death penalty was specifically ruled out.

Article 5. Non-applicability of statutory limitations

34. Two representatives expressed support for the article. One of them pointed out that the wording was consistent with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, to which his country was a party.

Article 6. Judicial guarantees

Article 7. Non bis in idem

35. Those two articles elicited express support on the part of the same delegation.

Article 13. Threat of aggression

36. One delegation, while sharing the view that the threat of aggression should be treated as a separate crime, considered the wording as too concise and questioned the use of the word "seriously", which in its opinion introduced a vague condition opened to varying interpretations.

Article 14. Intervention

37. One representative was of the view that this article required further examination. He insisted on the need to distinguish between armed subversive and terrorist activities and furthermore remarked that the concept of undermining the free exercise by States of their sovereign rights could not be dealt with in a simple manner. He pointed out that fomenting subversive or terrorist activities by organizing, assisting or financing such activities was a very serious act in itself, and that an additional characterization could weaken the content of the article. He added that further thought should be given to the question of retaining or deleting the word "seriously".

38. Commenting jointly on articles 12, 13 and 14, one representative, after noting that "aggression" (article 12), "threat of aggression" (article 13) and "intervention" (article 14) were considered crimes against peace, observed that situations arising after the commission of the act of aggression such as massacres, occupation and annexation, must also be punishable, since they were illicit. In his view, each of those three successive but closely linked phases - threat of aggression, aggression and effect of aggression - should be condemned as crimes against the peace and security of mankind, all three being illicit acts to be included in the draft.

Article 16. International terrorism

39. Some delegations endorsed the approach adopted so far by the Commission in characterizing international terrorism as a "crime against peace" and confining the scope of the article to terrorism carried out by a State against another State, which endangered international relations. In these delegations' view, internal terrorism came under internal law and did not endanger international relations.

40. Many other delegations, while welcoming the adoption of a provision on terrorism as a crime against the peace and security of mankind and while taking note of the Commission's intention to review the article in the light of provisions on complicity and on crimes against humanity, held that the approach taken so far by the Commission was too restrictive both ratione materiae and ratione personae.

41. On the first aspect, one representative, referring to paragraph (2) of the commentary to article 16, which explained that the title "International terrorism" was intended to distinguish the terrorism in question from internal terrorism, which did not endanger international relations, said that an act could be defined as a crime under the Code even if it did not endanger international relations. He

cited as an example genocide, which did not necessarily endanger international relations. In his view, crimes against humanity were in themselves of such a repugnant nature and so deeply offended the conscience of mankind that no other justification was needed for their inclusion in the Code. While recognizing that not every manifestation of terrorism would come under the Code, he felt that the consideration of whether an act of terrorism did or did not endanger international relations should not be the determining element.

42. On the second aspect, some delegations observed that article 16 referred only to acts by agents or representatives of a State and excluded acts of individual terrorism committed by persons, terrorist organizations and other elements having no link with a State. In their view, as long as the effect of the crime was to destabilize a State and to pose a threat to international peace and relations, it was immaterial whether the acts had been carried out by private individuals and organizations, as distinct from servants or agents of a State.

43. Also commenting on the scope of article 16, one representative suggested that the definition given in the article be supplemented by adding the direct or indirect effects of an act of terrorism on the security of mankind, irrespective of whether the perpetrator was an individual or a State and of whether there was any intellectual, physical or other form of complicity.

44. Another representative stressed that a clear distinction should be drawn between freedom fighters and terrorists. He pointed out that one man's terrorist might well be another's freedom fighter and that the struggle of all peoples under colonial and racist regimes and other forms of alien domination was a legitimate one, recognized to be such under the Charter of the United Nations, General Assembly resolution 1514 (XV) and the Universal Declaration of Human Rights. There was, he observed, a fundamental distinction between freedom fighters and liberation movements which sought to uphold international law, and terrorists who sought to undermine it.

45. More specific comments were made on the wording of the article. Thus, some representatives pointed out that the terms "agents or representatives of a State" were used without an indication of their specific content or of whether they were synonyms. They pointed to the possibility of overlap between the two terms. The inclusion in the article of a reference to the act of tolerating terrorist acts was welcomed by one representative but questioned by another.

46. The words "of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public" gave rise to some reservations. This criterion was viewed as being of a subjective rather than an objective nature and the question was asked how such a provision would be interpreted by a judge in weighing the seriousness of a particular act of terror.

47. Referring to the relationship between the article and other provisionally adopted articles, one delegation viewed as unclear the distinction between terrorism carried out by agents or representatives of a State in article 16 and the act of aggression referred to in paragraph 4 (g) of article 12. Another delegation pointed out that, depending on the specific circumstances, it might not be possible

to draw a clear distinction between the ingredients of international terrorism and those of intervention, described as the act of intervening in the internal or external affairs of a State and encouraging subversive or terrorist activities: it might be asked, for example, which of the two relevant provisions covered financing by a State agent of armed groups for the purpose of spreading terror in a given population and thus provoking the fall of the Government of another State.

48. Some delegations, referring to the phenomenon of "narcoterrorism", urged the Commission to link in the draft Code the crimes of drug trafficking and terrorism, with a view to promoting action by the international community to combat that terrible scourge.

Article 18. Recruitment, use, financing and training of mercenaries

49. Several delegations supported article 18 as currently drafted and welcomed the fact that it relied to a large extent on the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries. Some however noted with regret that, unlike the 1989 Convention, article 18 excluded the mercenary himself from its scope and covered only those who took part in recruiting, using, financing or training mercenaries.

50. As regards paragraph 1, one representative felt that the terms "agents of a State" and "representatives of a State" were somewhat overlapping in their meaning even if, from the point of view of international law, they were not equivalent. Another representative felt that paragraph 1 was too restrictive. In his view, the encouraging or tolerating of mercenary activities also constituted a crime against peace.

51. With respect to paragraphs 2 and 3, one representative pointed out that the definition of the term "mercenary" appeared to exclude individuals who committed one of the acts listed for a reason other than the expectation of receiving material compensation. In his view, this point should be properly addressed in another paragraph.

52. Referring to paragraph (2) of the Commission's commentary to article 18, in which the Commission said, inter alia, that article 47 of the 1977 Additional Protocol I, to the Geneva Conventions dealt "with the status of mercenaries, specifying that a mercenary shall not have the right to be a combatant or a prisoner of war", one representative said that article 47 permitted a party to the Protocol to deny the right to a mercenary but did not oblige a party to the Protocol to do so. He furthermore pointed out that a mercenary without the right to be a combatant or a prisoner of war benefited, as did any civilian definitely suspected of activities hostile to the security of the State, from article 5, third paragraph, of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (which in particular guaranteed him, in case of trial, the rights of fair and regular trial) and would, in any event, be covered by article 75 of Additional Protocol I to the Geneva Conventions. He therefore suggested that a provision along the lines of article 16 (b) of the 1989 Convention which contained a reservation concerning international humanitarian law be included in article 18 of the draft Code.

53. Two representatives regretted that the definition of the term "mercenary" contained in article 18 should be based on that of the 1989 Convention. One of them pointed out that his country had not signed the Convention as it had reservations to its text. The other felt that the definition of the term "mercenary" should be broader than that contained in the 1989 Convention.

54. Some delegations questioned whether the recruitment, use, financing and training of mercenaries were acts of sufficient gravity to justify their inclusion in the Code. One of them pointed out that the travaux préparatoires of the Convention showed clearly that States did not agree as to whether violations of the obligations set forth in article 5 of the Convention should be considered, or should always be considered, as crimes against the peace and security of mankind.

Article X. Illicit traffic in narcotic drugs

55. Several delegations welcomed the fact that the Commission had been able to draft a provision characterizing as a crime against humanity the illicit traffic in narcotic drugs, which constituted one of the century's evils and a scourge affecting the well-being of mankind as a whole. 3/ It was noted that the article included within its ambit every conceivable act connected with the crime in question, including money laundering operations, while at the same time excluding isolated or individual activities of small dealers.

56. While generally supporting the article, one representative observed that its scope ratione personae would have to be reviewed at a later stage in the light of the provision on complicity.

57. Reservations were on the other hand expressed on the article. One representative felt that its wording was not sufficiently precise to serve as a basis for the competence of an international jurisdiction. Another suggested a more explicit approach whereby illicit traffic in drugs on a large scale was a crime which all States, irrespective of where the actual crime had taken place, could prosecute and which, in the most serious instances, could be prosecuted by an international jurisdiction.

58. As regards the title of the draft article, one delegation suggested that it should contain a specific reference to psychotropic substances.

59. With respect to paragraph 1, some delegations were of the view that the words "agents or representatives of a State" were not necessary and should be deleted. They pointed out that if any individual could be a perpetrator of the crime there was no need to single out a special category of individuals. As regards the

---

3/ The question whether drug trafficking should also be characterized as a crime against peace was discussed in relation to the corresponding draft articles proposed by the Special Rapporteur. It is therefore dealt with in subsection 3 below.

enumeration of acts to be found in the paragraph, one representative observed that the article proscribed not simply illicit traffic in drugs, but rather the undertaking, organizing, facilitating or encouraging of such traffic. He observed that that approach, probably motivated by the desire to isolate as a crime against humanity only those aspects of drug trafficking that were most serious and therefore warranted being included in the Code as crimes, created a problem of consistency with the 1988 Convention. In his view, illicit traffic should be defined in a manner that approximated more closely to the definition in the 1988 Convention.

60. The inclusion of the qualifying clause "on a large scale" was supported by some representatives but gave rise to reservations on the part of others, who held that the activities of small and medium-size producers and intermediaries should also be incriminated under the Code.

61. Some representatives felt that the article should cover drug use. The view was on the other hand expressed that, while drug users certainly bore responsibilities for drug trafficking, it would not be practical to define drug use as an international crime.

62. With reference to the words "whether within the confines of a state or in a transboundary context", one representative observed that activities carried out "within the confines of a State" could not be regarded as crimes against the peace and security of mankind, since they had no international consequences. In his view, activities carried out within a State that were not linked in any way to other types of activities should not be covered by the draft Code - an approach which was consonant with the mandate entrusted to the Commission by the General Assembly in resolution 44/39, where reference was made to "persons engaged in illicit trafficking in narcotic drugs across national frontiers". He added that States could take domestic measures to regulate their citizens' activities in such a way as to ensure respect for the sovereignty, territorial integrity and political independence of other States.

63. Speaking generally on paragraphs 2 and 3 some delegations pointed out that, while those provisions represented a considerable effort at summarizing concepts, the description of conduct or activities covered by the article should be expanded and brought into line with article 3 of the 1988 Vienna Convention.

64. With specific reference to paragraph 2, one representative expressed the view that the forms of participation in the crime listed in the text should be made punishable separately.

65. Some representatives commented on the phrase "or transfer of property by a person who knows that such property is derived from the crime defined in the present article in order to conceal or disguise the illicit origin of the property". One of them pointed out that the terms "who knows" and "in order to conceal" were too subjective. Furthermore, he saw no reason why a distinction should be drawn between individuals who undertook, organized, facilitated, financed or encouraged illicit traffic in narcotic drugs and individuals who were involved in such activities through financial institutions, banks and investment companies

and why one category of individuals would be punished for having committed the crime itself, where as in the case of the other category of individuals, it would be necessary to prove that they had known that the property in question had been derived from the crime. After observing that the individuals in the first category were generally nationals of developing countries, whereas the second category involved individuals and institutions in developed countries, he suggested the terms in question be deleted from paragraph 2. Another delegation proposed that the words "or must have known" be added after the words "who knows" in paragraph 2, so as to cover cases where it could not be proved that the individual in question actually had knowledge of the criminal origin of the funds, but would have known had he applied the diligence required under specific circumstances.

66. The concept of "money laundering", which paragraph 2 was intending to cover according to the commentary thereto, was viewed as falling under the definition of accessory after the fact.

67. As for paragraph 3 one delegation suggested that it should become paragraph 1, thus facilitating the interpretation of current paragraphs 1 and 2. Another delegation pointed out that while paragraph 3 was by and large complete, it did not include the illicit sale of chemicals required for drug production. In connection with the words "contrary to internal or international law", one representative, after noting that the original draft had used the phrase "contrary to the provisions of the conventions which have entered into force", remarked that the dual reference to internal law and international law was unclear and seemed to leave unanswered the question of the reconciliation of a conflict between internal and international law. He suggested that, if the purpose of the reference was to ensure that certain acts were excluded from the definition of illicit traffic, another formulation should be used to achieve that purpose. He further remarked that a phrase such as "contrary to applicable international conventions" might be better than the phrase "contrary to international law".

68. Some representatives referred to the commentary to the article. One of them said that it was difficult to understand the comment in paragraph (1) that the 1988 Convention did not make the crime of illicit traffic an international one. Another representative, also referring to paragraph (1), observed that the wording seemed to imply that only paragraph 3 of the article dealt with psychotropic substances as well as with narcotic drugs. In his understanding, all three paragraphs of the article dealt with both narcotic drugs and psychotropic substances and both were covered by the abbreviated expression "narcotic drugs" used in the title and the first two paragraphs. As regards paragraph (6) of the commentary, one representative disagreed with the statement that paragraph 2 of the article explained the meaning of the words "facilitating" and "encouraging" in paragraph 1; in his view, paragraph 2 did not explain the meaning of those words, but only indicated a particular situation which would be covered by them.

3. Comments on draft articles submitted by the Special Rapporteur and referred by the Commission to the Drafting Committee

(a) Complicity, conspiracy and attempt

(i) General remarks

69. Some delegations favoured an approach whereby complicity, conspiracy and attempt, which in their view were only punishable in connection with the principal crime and were therefore of an accessory character, would be dealt with in the section of the draft Code dealing with general principles. They held that it should be left to the court to determine whether a person's involvement in the commission of a certain crime through such forms of participation had been sufficient, for instance, to make the person a perpetrator on the basis of complicity.

70. Other delegations supported the Special Rapporteur's approach of treating complicity, conspiracy and attempt as separate offences. In their view, such an approach was justified taking into account the extremely serious nature of crimes against peace and security of mankind and in order to strengthen the deterrent aspect of the Code; it was also more likely to ensure that participants in a crime who otherwise might escape criminal responsibility on the ground that they had not actually participated in the commission of the crime but whose conduct was in fact as reprehensible as that of the principal perpetrators, were duly covered by the Code.

71. Still other delegations favoured a case-by-case approach. Thus one representative said that complicity, conspiracy and attempt should be examined in relation to each of the crimes enumerated in the draft Code in order to determine whether the application of each of these notions was possible with regard to each of the crimes. Another representative was of the view that it was not possible to give a general answer to the question of whether complicity, conspiracy and attempt should be treated as separate offences or grouped together under the heading of general principles; the nature of the crime and the specific form of participation would have to be taken into account in each particular case. So far as complicity was concerned, he favoured the inclusion in the appropriate section of the draft Code of a general principle on various forms of participation in a crime before it was committed. As for complicity after the commission of the crime, conspiracy and attempt, he felt they should be included in the draft Code as separate offences. A further view was that, while complicity and conspiracy should be treated as separate crimes, attempt should be examined in relation to each of the crimes covered by the draft Code.

72. Some representatives, while acknowledging that the placement of the draft articles on complicity, conspiracy and attempt among the general principles might be useful, remarked that if it was intended that offences under the draft Code should be established in relation to those concepts, the articles should be placed in the section on specific offences, an approach which, however, need not rule out their placement in the section on general principles. One of those representatives considered that it was important to complement the identification of substantive

crimes against the peace and security of mankind with the attachment of international criminal responsibility to persons who participated in such crimes as accomplices or conspirators, but of less importance, perhaps, to make the attempt to commit a crime an offence under the draft Code.

(ii) Draft article 15 (Complicity)

73. Several delegations supported the new version of draft article 15 submitted by the Special Rapporteur and reproduced in footnote 27 of the Commission's report. One of them, after pointing out that the Commission should not be too ambitious, since complicity and other notions could not be defined with all the desired precision, at least at the international level, felt that the Special Rapporteur's new version of the draft article contained the appropriate guidelines to enable the judge to determine the responsibility of each of the accused and thus to distinguish perpetrators from co-perpetrators and accomplices. In this context, he drew attention to the difference between co-perpetrators and accomplices. He further noted that, while the earlier version of draft article 15, paragraph 2, reproduced in footnote 26 of the Commission's report had taken into account accessory acts prior to or concomitant with the principal offence and subsequent accessory acts, it had not been sufficiently broad to cover all types of complicity. He endorsed the Special Rapporteur's view on the link between the act and the perpetrator, and on the fact that complicity comprised material, intellectual as well as abstract acts, and supported the new version of draft article 15, which he found suitably precise.

74. Another representative viewed the new version as a great improvement over the former one because it was descriptive, more detailed and more precise. A third representative, after remarking that the distinction between being the principal and the accomplice had been rendered extremely difficult by the sheer scale of organized crime and its internationalization, noted with satisfaction that the revised version proposed by the Special Rapporteur seemed to have taken into account the common concern of members of the Commission to make provision for the criminal liability of individuals carrying out official functions.

75. Some delegations, while generally supporting the new version of draft article 15 proposed by the Special Rapporteur, made suggestions aimed at improving its wording or clarifying its content. Thus one representative, after remarking that the new version of draft article 15 rightly covered both physical and intellectual acts and addressed the question of the temporal succession of acts of complicity, insisted on the need to specify in subparagraph (c) that, in order to constitute acts of complicity, acts occurring after a crime must have been committed on the basis of an understanding or an agreement, entered into before or after the commission of the crime.

76. The same subparagraph (c) gave rise to reservations on the part of some representatives. One of them indicated that under the law of his country complicity arose only as a result of accessory acts prior to or concomitant with the principal offence, and that he could see no good reason for extending the concept to include assistance given to the perpetrator after the commission of a crime. Another remarked that an agreement prior to the commission of the offence

was the key element of complicity after the offence and that an act which did not help the principal to perpetrate an offence did not constitute complicity after the offence, but rather a separate crime. One representative expressed readiness to go along with this approach, even though he favoured the inclusion of acts subsequent to the commission of the crime as acts of complicity.

77. One representative suggested that it be made clear that complicity applied not only to crimes against the peace and security of mankind but also to attempt and conspiracy, and that the scope of the definition of complicity be reduced by limiting the applicability of the draft article to intentional acts. After emphasizing that in the case of crimes against peace and crimes against humanity care should be taken not to apply the concept of complicity as it was understood in traditional criminal law, he indicated that it would not be reasonable to charge individuals with complicity in an international crime if all forms of resistance would have proved futile. He suggested that in all such cases greater discretion should be left to the judge in determining, in each specific case, the role of the various participants and the link between the act and the perpetrator. He noted with satisfaction that the draft article covered incitement, which was closely related to propaganda, and pointed out that it would be wrong to underestimate the control which belligerent and racist propaganda could exert over the masses or to invoke freedom of expression, information or the press in tolerating such activities.

78. Another representative, after endorsing the concept that every person associated with a crime under the Code, whether he be an originator of the crime or merely an executor, should be inculpated - an approach which was all the more justified as the crimes to be covered by the Code were invariably committed by a number of persons - observed that care should be taken ensure that the persons inculpated had acted intentionally or in the knowledge that they were committing an unlawful act. As to whether the notion of complicity should include not only acts prior to or concomitant with the principal offence but also subsequent acts, he supported the latter solution provided that there was a nexus between the principal offence and subsequent accessory acts. He added that, from the point of view of form, the new version of the draft article could bear improvement since a literal reading of the first paragraph conveyed the impression that it contained the definition of the crime of complicity, whereas in reality the definition was contained in subparagraphs (a), (b) and (c) of the second paragraph.

79. Some representatives felt it necessary to define the terms "principal" and "accomplice", as that would be of practical significance to the court in determining penalties, even though one of them recognized that given the specific nature of the draft Code it would be difficult under certain circumstances to differentiate a principal from an accomplice. The same representative added that, while physical and non-physical complicity had been dealt with adequately in subparagraphs (a) and (b) of the second paragraph, the wording could still be improved.

80. Other delegations, however, did not think that there was a need to try to define the principal perpetrator of the crime. It was noted in this connection that the distinction between co-perpetrators and accomplices was sometimes difficult to draw and that it should be left to the judge to determine the

responsibility of each of the accused. A further remark was that the definition of the crime was itself a definition and identification of the perpetrator.

81. As regards the concept of "abetting" in subparagraph (a) of the draft article, one representative regretted that this concept had been included in the definition of complicity because, like conspiracy and attempt, abetting was an offence in itself and should therefore be defined in a separate article. Another representative pointed out that a person abetted the commission of a criminal act when he or she instigated any person to commit such an act, or engaged with other persons in any conspiracy and internationally aided the commission of any criminal act. He suggested that, by way of explanation, the draft article should also refer to "voluntary concealment of material facts and facilitating commission of any such act".

82. A number of concrete proposals were made as regards the wording of the draft article. Thus it was suggested that the first sentence of the draft article should be redrafted as follows:

> "Participation in the commission of a crime against the peace and security of mankind in the manner set out in subparagraphs (a), (b), and (c) constitutes the crime of complicity"

and that the words "the following are acts of complicity" should be deleted. Another remark was that the text should make it clear that the acts constituting the crime had to be carried out in concert. One representative considered the new wording of the draft article as too wide and imprecise. He observed that the provision of means would only be an offence if the provider knew that those means were going to be used to commit a crime. As for the making of a promise, he felt that if that were considered as a separate element of complicity, it should be specifically related to the commission of the offence and should be known to the promisor to be so related.

83. Several reformulations of the draft article were proposed. One of them concerned subparagraphs (a) and (c) and read as follows:

> "The following are acts of complicity:
>
> "(a) Aiding or abetting in any way the commission of a crime, even if it would otherwise still have been committed;
>
> "...
>
> "(c) Furnishing aid or assistance after the commission of a crime by virtue of promises made prior to its commission."

84. Another reformulation of the entire draft article read as follows:

> "Article 15. Complicity
>
> "Taking part, without direct participation, in the commission of a crime against the peace and security of mankind constitutes the crime of complicity.

"The following are acts of complicity, whether by action or by omission:

"(a) Inspiring the commission of such a crime by, inter alia, promises, threats, abuses of authority or power, instructions, incitement, urging, instigation or abstention, when in a position to prevent it;

"(b) Gifts, aid, assistance or provision of means to the direct perpetrator which facilitated the act, knowing that they would be used for that purpose;

"(c) Aiding the direct perpetrator, while knowing of his criminal conduct, to evade criminal prosecution either by giving him refuge or by helping him to eliminate the evidence of the criminal act."

It was explained that the suggested text underscored the following points and introduced the following changes with regard to the revised text of the Special Rapporteur: The accomplice was not a perpetrator, hence the phrase "without direct participation"; the crime of complicity could be committed by action or by omission; intellectual acts should logically precede physical acts, hence the transposition of subparagraphs (a) and (b); included among intellectual acts were abuses of authority or power, so as to take into account a superior officer's consent to a crime or to instructions which might be direct orders to commit a crime; included among physical acts were gifts, which might be of a pecuniary nature, as well as the concept of an act committed with full knowledge of the facts; the phrase "after the commission of a crime" had been deleted, and the scope of subparagraph (c) extended by including the concept of knowledge of the criminal conduct of the direct perpetrator of the crime.

85. Addressing jointly the notion of complicity and the notion of conspiracy, one representative noted that, while the new versions defined both complicity and conspiracy in terms of "participation" in the commission of a crime, the text contained no definition of the latter concept. He observed that, if attention was to be focused on the acts which constituted a crime of complicity or conspiracy, there was no longer any reason to make "participation" the key element of the definition. He further remarked that the reason for the separate treatment of preparatory acts of complicity and conspiracy appeared to be a desire to charge and punish an accomplice less severely than the perpetrator of the substantive offence. In his view, it was difficult to understand why a person should be charged for only part of a crime if in fact the whole crime had been committed with his participation. After pointing out that an accomplice was usually a person who participated in the commission of a crime and not simply a person who participated only partially, he stressed that the article on complicity changed that customary understanding by defining an accomplice as a person who could not be charged and convicted of the substantive crime but only of a secondary participatory offence. In his view, it might perhaps be more prudent, if it was impossible to lay down a simple definition for crimes of complicity and conspiracy, to allow the court itself to determine the degree of criminal responsibility of A and B, in a case where A helped B to carry out a crime, and to reflect the distinction, if any, in the sentences imposed rather than in the offences with which they were charged. If on the other hand no crime other than certain preparatory acts had actually been

committed, the situation would be equivalent to that of attempt, as specified in draft article 17. He concluded by remarking that the difficulty with incomplete crimes of that sort was due to a desire to distinguish between: (1) mere preparatory acts; (2) the commencement of execution; and (3) the crime itself. Although he appreciated the need clearly to define all offences, he thought that that concern should not be taken too far: the definitions of complicity and conspiracy could be left at the level of general principle, because there might be cases in which an accomplice, under the terms of draft articles 15 and 16, should be punished more severely than the actual perpetrator of an offence.

86. Some delegations commented on issues reflected in paragraphs 47 and 48 of the Commission's report. One representative said that the fact that it was impracticable to prosecute a whole nation was no reason for not applying the concept of complicity to crimes against humanity; the concept could be just as effective as it was in relation to war crimes committed by individuals if prosecution was confined to leaders and organizers. He further rejected, as did also another representative, the contention that the weak point of the International Convention on the Suppression and Punishment of the Crime of Apartheid was that the application of the concept of complicity in traditional criminal law unduly widened the circle of offenders. In the view of both representatives, this was a gratuitous and unwarranted criticism of the Convention, whose "weak point" stemmed from the lack of political will on the part of certain countries to engage in a meaningful struggle against apartheid.

87. Some delegations expressed reservations on the whole approach followed so far on the notion of complicity because the notion of participation had not as yet been given sufficient weight in the draft Code. One representative in particular indicated that complicity was merely one of the forms of participation in a crime and could not be considered a separate or independent crime. He suggested that the question of complicity be dealt with in connection with the general problem of participation, which had yet to be properly addressed in the context of the draft Code. After remarking that many of the crimes in the Code could not be committed by single individuals, the most conspicuous examples being aggression and colonial domination, he stressed that the question of responsibility for such crimes, to which the existing provisions failed to provide an adequate answer, could be resolved by indicating who could be held responsible in the case of each crime, by drafting a general provision covering that point or by a combination of those two solutions; whatever the solution adopted, complicity should, in his view, be treated in the context of participation, not as a separate crime.

88. Along the same lines, another representative said that it was preferable to abandon the traditional perpetrator/accomplice dichotomy and to adopt the broader notion of "participant", an approach which would have as a consequence that the traditional descriptions of acts of complicity, such as aiding and abetting, became unnecessary, as did the very concept of complicity, since "participation" encompassed all cases in which more than one person was the active subject of the crime. He noted that the revised article 15 submitted by the Special Rapporteur mixed the two approaches, as it affirmed that "participation" constituted the crime of complicity and then listed a series of acts of complicity. In his view, the article would have been simpler and clearer if it had been faithful to the idea of "participation".

89. On the other hand, the view was expressed that the formulation of a general provision on criminal participation, as suggested by some members of the Commission, created a danger of giving the judge an excessive role in the assessment in each specific case without supplying him with the requisite information; furthermore, it was remarked, the concepts of perpetrator and accomplice had long been embodied in criminal law, and an accomplice to a crime provided for in the Code would be liable to the respective penalty.

(iii) Draft article 16 (Conspiracy)

90. Some delegations fully supported the inclusion in the draft Code of the notion of "conspiracy" as distinct from that of "complicity", as well as the revised version of draft article 16 proposed by the Special Rapporteur and reproduced in footnote 29 of the Commission's report. Those delegations stressed that in the case of conspiracy no distinction was made between direct perpetrators and indirect perpetrators, perpetrators and co-perpetrators or perpetrators and accomplices, since all were acting in concert. In their view, the draft Code should not have a scope more limited than that of the Convention on genocide, apartheid, narcotic drugs and slavery, which had tended to confirm the trend towards distinguishing between conspiracy and complicity. One representative indicated that only the notion of conspiracy would make it possible to put forward such elements as criminal intent, agreement with another person and attempt to execute the crime. He drew attention in that connection to the first sentence of paragraph 66 of the Commission's report, which summarized the Special Rapporteur's response to certain questions raised. In his view preparatory acts, such as participation in a plan to incite or carry out a war of aggression, were punishable and called for an appropriate penalty. Moreover, certain acts, such as genocide and apartheid, were precisely the kinds of crimes which could be perpetrated only where there was a conspiracy between one group and the State against other ethnic, religious, racial, tribal or cultural groups.

91. Some delegations elaborated on the elements constituting the notion of "conspiracy". One representative indicated that, while one element was an agreement between two or more individuals to plan and commit a crime, another element was the physical acts performed to carry out the crime planned. Another representative defined conspiracy as "an agreement between persons to commit an illegal act, or to cause such an act to be committed, or to commit an act that was not illegal by illegal means or to cause such act to be committed, irrespective of the legality of the ultimate object of such agreement." Still another representative pointed out that conspiracy was punishable where two or more persons participated in a common and established plan to perpetrate a crime even if no crime was committed. In his view, assessment of the degree of culpability should be influenced by the knowledge that there could be cases in which a proposal to form a conspiracy was made and not agreed to and in which a conspiracy was followed by an act begun or completed in preparation for the commission of a crime. He remarked that some international crimes, such as genocide, could not be committed by individuals acting alone, and this raised the problem of collective responsibility, a legal concept to be handled carefully, taking into account the nature of the crime. A fourth representative, while agreeing that conspiracy should be included as a separate offence in the list of crimes, considered it

essential that the concept should be clearly defined so as to avoid any overlap with complicity or attempt. In his view, it should also be made very clear that all participants in the conspiracy actually committed the same crime and were subject to punishment in accordance with their respective roles in the conspiracy.

92. Some delegations, while supporting the inclusion in a separate provision of the notion of conspiracy and approving in general the new version of draft article 16 presented by the Special Rapporteur, made proposals regarding its current drafting. One delegation believed that the draft article should specifically refer to mens rea as an additional element of the crime. As regards the first paragraph, one delegation proposed to amend it to read "a common and established plan". Another delegation held that the words "participation in a common plan" placed too much stress on the overt acts as a necessary element of conspiracy and suggested that the paragraph be deleted. The word "jointly" in the second paragraph was characterized as "confusing" by one delegation, which proposed its deletion. Also with respect to the second paragraph, one delegation suggested replacing the words "the participants" by the words "two or more participants". Another delegation pointed out that since in a conspiracy all participants were perpetrators it would not be appropriate to include in the definition of conspiracy acts which were committed jointly by several persons, since that would limit participation, or the concept of perpetrator, to those who physically carried out the crime.

93. Some delegations were critical of the new version of draft article 16. One representative pointed out that, while the concept of conspiracy covered what were known in some legal systems as criminal agreements, the proposed text did not clarify the basic elements of conspiracy; rather it gave rise to confusion between the concepts of conspiracy and complicity. He stressed the need for a clear distinction, even if more detailed formulations were required. Another representative expressed preference for the original version of draft article 16, reproduced in footnote 28 of the Commission's report, because it was more explicit about the question of responsibility and because in the two alternatives proposed for paragraph (2) it highlighted both the individual and the collective dimensions of responsibility. In her view, each participant in a conspiracy was responsible not only for the acts he personally committed but also for all the acts committed collectively by all the parties to the conspiracy; only the degree of culpability and the penalty imposed would vary according to individual participation. She added that conspiracy differed from complicity in that, in the case of conspiracy, no distinction was made between direct perpetrators and indirect perpetrators. Also in support of the earlier version, one representative said that the desired objective was to combat the idea that no individual was responsible for collective crimes and felt that the original version of the draft article was much more explicit in that regard. He further remarked that, although crimes such as genocide and apartheid could not be committed by isolated individuals but arose from a common plan involving joint responsibility, that joint responsibility did not necessarily imply collective punishment, because the mere fact of belonging to a group could not be viewed as an act of complicity. In his view, the second alternative text of paragraph (2) of the original version of draft article 16 was closer to that concept.

94. Some delegations proposed complete reformulations of the draft article on conspiracy. Thus, one delegation proposed that the first paragraph be deleted and that the second paragraph be reformulated as follows:

> "Conspiracy means any agreement between two or more persons to commit a crime against the peace and security of mankind."

Another delegation, after observing that draft article 16 made no reference to cooperation in a common plan as a form of complicity, even though in its view the co-perpetrator was more culpable than the accomplice, suggested the following reformulation:

> "The act of preparing a common plan to commit any of the crimes defined in this Code or participation therein constitutes conspiracy."

95. Reservations or doubts were on the other hand expressed as to the inclusion of conspiracy in the draft Code as a separate crime. Thus, one representative held that such an approach was questionable except in relation to crimes against peace in accordance with the principle adopted by the Nürnberg Tribunal, and to conspiracy to commit genocide as punishable under article III of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Another representative felt that the concept of conspiracy had not become a part of general theory in all national criminal codes and therefore doubted the wisdom of introducing that concept in international criminal law. Still another representative drew attention to the complexity of the problem, pointing out that while in common law systems "conspiracy" was a separate crime, the concept of complot in continental law systems had a far more limited application and that the introduction of the concept of conspiracy in international law had proved difficult. He doubted whether agreement to commit a criminal act not followed by the commission of the act should have a place in an instrument such as the draft Code which was intended to punish only very serious crimes, and was inclined to regard conspiracy as a particular form of participation in the crimes defined in the Code.

(iv) Draft article 17 (Attempt)

96. Several delegations supported the inclusion of the concept of attempt in the draft Code as well as the new version of draft article 17 proposed by the Special Rapporteur and reproduced in footnote 31 of the Commission's report. It was said in this connection that the new text filled the legal lacuna left by the former text as reproduced in footnote 30 of the Commission's report, which had not defined attempt. The remark was also made that the new version of draft article 17 was more balanced than the initial version, and more clearly highlighted the elements of harmful intent and gravity which distinguished punishable attempt and non-punishable intent. Some delegations pointed out that the new version of the draft article rightly referred to the concept of attempt in general terms and left it to the discretion of the court to determine its applicability on a case-by-case basis. One representative, while supporting the new version presented by the Special Rapporteur, pointed to the difficulties which would inevitably arise from its implementation owing to the fact that a mere attempt was not treated as a

punishable act under the legislation of some countries. He noted, however, that an attempt should be regarded as a commencement of execution. He further remarked that the definition of attempt would not be complete without the moral element proposed by the Special Rapporteur, namely, the failure or halting of the act only because of circumstances independent of the perpetrator's intention.

97. Some delegations, while supporting in general the new version of draft article 17 submitted by the Special Rapporteur, offered suggestions with a view to improving it. Thus, one delegation recommended that the two paragraphs of the draft article be combined. Another delegation supported the definition given by the Special Rapporteur provided that it excluded mere intent and preparatory acts not followed by execution. Still another delegation thought that the definition of attempt should also refer to any act towards the commission of a crime or to cause such a crime to be committed.

98. Concrete proposals were also made with specific reference to the second paragraph of the proposed provision. One delegation suggested that the words "independent of the perpetrator's intention" be replaced by "alien to the perpetrator's intention". Another delegation suggested that the second paragraph be amended to read:

> "Attempt means any commencement of execution of a crime against the peace and security of mankind or the commission of unequivocal acts leading directly to its execution that failed or were halted only because of circumstances independent of the perpetrator's intention."

The same delegation added that the seriousness of the attempt should be a factor in determining whether or not it was punishable, and that it should be left to the judge to decide on a case-by-case basis.

99. Some delegations, while not ruling out the possibility of including the notion of attempt in the draft Code, elaborated on specific aspects of their position on this notion.

100. Thus, one representative felt that while it was difficult, although not impossible, to include attempt among the crimes against peace, the same was not true in respect of crimes against humanity. He also noted that attempt as envisaged in draft article 17 was not clearly differentiated from an abortive crime. He therefore suggested, first, that the concept of perpetrator of a crime against the peace and security of mankind should be defined so that a distinction could be drawn between accomplice and accessory after the fact, and secondly, that the concept of an abortive crime should be added to that of attempt: an abortive crime would be one in which the perpetrator had done everything in his power to execute the crime but had failed because of circumstances independent of his intention, whereas attempt would refer to cases in which the perpetrator commenced execution of a crime through direct acts but failed to carry it through.

101. Another representative, after recalling that the concept of attempt was not included in the charters of the international military tribunals or in the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal,

nor in the 1954 draft Code, suggested that the concept of attempt as defined in the new version of draft article 17 should be reserved for crimes against humanity, since it was difficult, in the case of crimes against peace, such as aggression, to distinguish between a commencement of execution and the act itself.

102. A third representative felt that the Commission could give greater priority to attempt in order to arrive at a more rigorous definition of the notion. He took issue with the view reflected in paragraph 71 of the Commission's report that attempt was more easily conceivable in the case of a crime against humanity than in the case of a crime against peace and suggested that the proposed provision should include a definition of commencement of execution while explicitly mentioning preparatory acts, which were of cardinal importance in a case involving an attempt against peace.

103. One representative while favouring the inclusion in the section on general principles of the draft Code of a provision to the effect that attempt to commit a crime should be treated in the same manner as the actual commission of the crime, held that an attempt which did not lead to the commission of the crime might entail a lesser sentence than if the crime had actually been completed. In his view, it might also be useful to include a provision under which an attempt to commit a crime in circumstances which could not possibly lead to the actual commission of the crime would not entail criminal responsibility.

(b) International illicit traffic in narcotic drugs

104. Many delegations welcomed the fact that the Special Rapporteur in his eighth report had submitted two draft articles on international illicit traffic in narcotic drugs, namely, draft articles X and Y, to be found in their original version in footnote 32 of the Commission's report, and in their revised version in footnote 34 of the report. The inclusion of drug trafficking in the draft Code was widely supported. It was said in this connection that drug trafficking constituted a threat to the health and well-being of peoples and had frightening implications for all States, especially for small States.

105. Many delegations favoured the incrimination of drug trafficking both as a crime against peace and as a crime against humanity, as proposed by the Special Rapporteur in draft articles X and Y, respectively. It was said in this connection that drug trafficking clearly qualified both as a crime against humanity, inasmuch as it threatened the health and well-being of mankind, and as a crime against peace, in view of possible linkages between drug barons and drug cartels on the one hand and terrorists and mercenaries on the other, and of the threat to international peace and security resulting therefrom. It was also pointed out that as a crime against humanity, drug trafficking on a large scale constituted an attack on the right to life, physical integrity and health of peoples which could be compared to a form of genocide, and that as a crime against peace, it endangered political stability and had a destabilizing effect on some countries, thus constituting an obstacle to harmonious international relations.

106. More specifically, one representative observed that drug trafficking could affect international peace by giving rise to a series of conflicts, for example,

between the producer or dispatcher State, the transit State and the destination State, i.e., the State where narcotic drugs and psychotropic substances were delivered, distributed, sold and consumed. While remarking that great care should be taken to depoliticize any action to be taken in respect of individuals or legal persons, whether or not they were agents or representatives of a State, he agreed in principle that private groups or public officials could be perpetrators or accomplices in respect of illicit traffic in narcotic drugs, thereby threatening international peace, and that a State's stability could be undermined as a result of acts committed by individuals engaged in narcoterrorism. He furthermore remarked that failure by some States to cooperate in dealing with such acts in their territory as the transit and distribution of narcotic drugs and psychotropic substances and money laundering could lead to social and economic breakdown in those States, which would inevitably have an impact on their relations with the other members of the international community.

107. Some delegations, while supporting the characterization of drug trafficking as a crime against humanity, queried its characterization as a crime against peace. It was said in this connection that the fact that drug trafficking was often linked with terrorism and was a potential source of conflict between States did not provide sufficient grounds for it to be characterized as a crime against peace.

108. Several other reasons were invoked against a dual characterization. Some delegations felt that there was no practical reason to have two separate provisions characterizing the illicit traffic in narcotic drugs as a crime against peace on the one hand and as a crime against humanity on the other, and questioned in general terms the usefulness of distinguishing in the Code between crimes against peace and crimes against humanity. One representative pointed out that the mere involvement of the State as envisaged in draft article Y (crime against humanity) did not appear to justify the dual characterization, because ultimately only individuals would be held responsible for the offence. He felt it preferable to adopt a single draft provision treating the offence as a crime against the peace and security of mankind because the twofold characterization might in practice give rise to a splitting of charges if two counts arising out of the same offence were proffered against the same defendant. Another representative said that the debate on whether drug trafficking should be treated as a crime against peace, a crime against humanity or a crime against the peace and security of mankind, drew attention to the ambiguities involved in those distinctions.

109. Some delegations, while supporting the dual characterization of drug trafficking as a crime against humanity and a crime against peace, wondered if the distinction had been clearly brought out in the respective draft articles and expressed some doubts concerning the scope and contents of the proposed provisions. Thus, one representative pointed out that according to the new versions of draft articles X and Y drug trafficking as a crime against peace would have what was described in paragraph 81 of the Commission's report as a State aspect, on either an internal or an international plane, whereas as a crime against humanity it would in most cases have an impact on a State, on an internal plane, affecting large sections of the population. He felt however that, contrary to the analysis in paragraph 81, there could be cases where drug trafficking had an international aspect without being necessarily a crime against peace: for example,

when the international effect was not such as to pose a threat to international peace or relations but great harm was done to the population in the producer and consumer countries, the proper classification was a crime against humanity. He noted that both draft articles X and Y quite properly confined the crime to mass traffic in drugs on a large scale. In his view, however, emphasis should be placed more on traffic on a large scale than on mass traffic: if "mass" meant involving large sections of the population, some types of drug trafficking which existed on a large scale in terms of the quantity being traded might not necessarily involve large sections of the population and on that account would not qualify as crimes under the Code. He further observed that there was no need to define the term "organized on a large scale" since the question of its meaning could be left to the appropriate court. In his view, the main difference between draft articles X and Y submitted by the Special Rapporteur was that, whereas draft article X was confined to drug trafficking in a transboundary context, draft article Y dealt with trafficking that might be in the context of a State or in a transboundary context, a distinction which, according to him, was not adequate.

110. Referring to the scope and contents of the proposed provisions, one representative held the view that direct perpetrators and individuals who provided advice and training in connection with the activities in question, who directed or tolerated such activities, who engaged in trafficking or who consumed narcotic drugs and psychotropic substances, should all share equal criminal responsibility under a code of crimes against the peace and security of mankind. He pointed out that narcoterrorism was financed solely from the proceeds of sales to consumers and that the relationship between traffickers, terrorists and consumers must therefore be taken into account when the degree of responsibility was determined and when the relevant rules were prepared: if widespread consumption of narcotic drugs and psychotropic substances was a serious threat to the health of all mankind, the crimes associated with drug addiction and with the social environment in which drugs were consumed were also a serious threat to all mankind.

111. Along the same lines, another representative pointed out that the tendency to concentrate on measures to curb the supply of drugs while disregarding the growth in demand was evident in the formulations proposed by the Special Rapporteur. After recalling that the problem of consumption had been addressed in the 1988 Convention, he suggested that while it might well be appropriate to leave the issue of consumption to be regulated by national laws, the Commission should at least consider the issue so as to determine to what extent it should also be addressed in the draft Code.

112. Still another representative was of the view that the new versions of draft articles X and Y presented by the Special Rapporteur were ambiguous for the following reasons: first, because the text failed to specify that the drugs were used for an illegal or unlawful purpose, and secondly, because the provisions did not indicate what exactly constituted traffic "on a large scale".

113. The advisability of combating drug trafficking at the level of international criminal law was on the other hand questioned by several delegations, which viewed concerted national efforts as the best response to that challenge. Thus, one representative stated that he could not endorse the two draft articles

characterizing illicit drug trafficking as a crime against peace and a crime against humanity as proposed by the Special Rapporteur, whether in the context of the codification or even of the progressive development of international law. After pointing out that the 1988 Convention, which strengthened international cooperation in the prevention and punishment of such traffic, stopped short of characterizing illicit drug trafficking as a crime against humanity, he observed that the characterization of "crime against peace" or "crime against humanity" had so far been reserved for crimes such as aggression, genocide or war crimes and that in order to warrant such a characterization the offence must be of a serious nature and be defined with precision. In his view, transboundary traffic organized on a large scale did not necessarily meet the criteria for characterization as a crime against peace or a crime against humanity, even though its suppression should be given the highest priority by the international community.

114. Another representative considered that it was unnecessary to deal with drug trafficking in the draft Code since the national legislation and judicial systems of States effectively punished crimes related to drug trafficking. He pointed out that from a legal point of view it was the responsibility of the State on whose territory the crime was committed to institute proceedings and recalled that since the beginning of the century the crimes in question had been the subject of 15 international conventions. He indicated that, as a signatory to the 1988 Convention, his country was profoundly committed to the international campaign against illicit trafficking and was in the process of streamlining its national legislation in order to bring it into line with the provisions of the Convention. In his opinion, the offences under consideration could more effectively be dealt with under domestic legislation and it was premature to tackle them at the international level, if only because of the current lack of an international mechanism to punish those engaged in drug trafficking.

115. Still another representative emphasized the importance of cooperation among States to combat international drug trafficking. She stressed that the failure of some States to cooperate by combating manifestations of that crime within their own territory, including transit, distribution, sale, consumption and money laundering, contributed to the disintegration of society, and welcomed the emphasis placed in paragraph 85 of the Commission's report on international cooperation as a key to the eradication of the scourge of drug trafficking. After recalling that her country had concluded bilateral cooperation agreements with some countries which had shown the required degree of political will, she stressed that the relevant provisions of such agreements should preserve the principles of sovereignty, territorial integrity and political independence. 4/

4/ For the comments made at a subsequent stage on article X (Illicit traffic in narcotic drugs) as provisionally adopted by the Commission, see paragraphs 55-68 above.

(c) Breach of a treaty designed to ensure international peace and security

116. Referring to paragraphs 89 to 92 of the Commission's report and to the draft article entitled "Breach of a treaty designed to ensure international peace and security", some delegations supported the inclusion of the proposed provision in the draft Code. They underlined the importance of the treaties in question, including arms limitation and disarmament treaties, and the universal condemnation that their violation should evoke, they regretted the Commission's failure so far to reach an agreement on an issue directly related to the strengthening of law and order in international relations and they urged the Commission to make efforts to reconcile the different views on the matter.

117. Other delegations, without opposing the inclusion in the draft Code of the proposed provision, struck a note of caution in dealing with the matter. Thus, one representative pointed out that although the subject deserved careful consideration it was necessary to identify first the treaties in question and to define the real consequences for international peace and security of their breach. Another representative insisted on the need not to violate the principle of non-discrimination and to cover only the most serious breaches of treaties having a universal scope of application which, in view of their scale or their nature, constituted a threat to international peace and security. He suggested that the Commission should revert to the draft article only after the completion of its consideration of the other provisions of the draft Code. Still another representative remarked that the principle involved in the proposed provision was not limited to the narrow sphere of treaties to which some States might be parties and others not, but was equally relevant to any international obligation to which some States might not be, or might not consider themselves to be, parties. In his view, the detailed analysis of the nature of an international obligation and its breach, as set out in the commentary to Part One of the draft articles on State responsibility, might guide the Commission in its current consideration of the subject, especially in determining when any action or inaction, whether in respect of a treaty or another form of international obligation, might constitute a crime justiciable within the framework of the draft Code.

118. A third group of delegations expressed opposition to the inclusion of the proposed provision in the draft Code. One argument was that such a provision would raise fundamental legal questions concerning the validity and interpretation of treaties and would in particular violate the principle of the relativity of the effects of treaties by giving non-parties to a treaty the power to invoke its violation. Another argument was that the proposed provision would also violate the principle of the universality of the crimes included in the draft Code, since the same action would constitute a crime or would not, depending on whether a State was or was not a party to the treaties in question. This, it was remarked, could lead to a flagrant discrimination between countries parties to such treaties, whose leaders could incur responsibility in a crime against peace in case of violation, and countries not parties to such treaties, whose leaders could not be incriminated for the same acts. Other observations included the remark that the whole notion of "treaties designed to ensure international peace and security" was rather vague and the suggestion that the acceptability of the draft Code might be jeopardized if the proposed provision was to be adopted.

4. Question concerning the establishment of an international criminal jurisdiction

(a) General considerations

119. Several delegations welcomed the section of the Commission's report dealing with the question concerning the establishment of an international criminal jurisdiction and thanked the Commission for its swift and helpful response to the General Assembly's request contained in resolution 44/39. The said section was praised for setting out lucidly the issues involved and the various questions which needed to be answered, and providing a very useful survey of all aspects of the establishment of an international criminal court.

120. Some delegations supported the idea of establishing an international criminal jurisdiction. One representative stated that the undertaking was of great importance at the legal, political and practical levels. He stressed that the establishment of a standing international criminal court would mark a significant step forward and that if serious thought was to be given to a code of crimes equally serious thought should be given to the machinery for its implementation. Another representative pointed out that it would not make sense to elaborate a code of crimes against the peace and security of mankind without also establishing a mechanism to ensure its implementation. He agreed with the Commission that recent developments in international relations, which had strengthened the confidence of States in the possibility of basing international order on the rule of law, made the establishment of such a jurisdiction more feasible than when the matter had been studied earlier. He furthermore remarked that the international community had gradually grown increasingly aware that certain international crimes had achieved such wide dimensions that they could endanger the very existence of States and seriously compromise international peaceful relations - which explained the request contained in resolution 44/39 and reiterated by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and had also prompted the views on the subject recently advanced in the General Assembly by the Foreign Minister of a State which was a permanent member of the Security Council.

121. Along the same lines, it was pointed out that the establishment of an international criminal jurisdiction should set in motion a process that would progressively bring about a revolutionary transformation in the very functioning of international law, setting it on a sounder basis. The remark was also made that international criminal law should incorporate the three elements of crimes, penalties and jurisdiction and that States should be able to appeal to an international criminal jurisdiction if a State in which a criminal act was being prepared refused to try the conspirators in its own courts, or even to take prompt and urgent enforcement measures. A further observation was that the possible misgivings of those who pleaded national sovereignty and the regime of universal jurisdiction of national courts could be countered by the argument that an international criminal jurisdiction had the recognized advantage of uniform application of the law.

122. One representative stressed that the codification of international crimes was acceptable to his delegation only if the prosecution of such crimes was left to an

international criminal court. He suggested that the Commission should discuss the question of the establishment of an independent, international criminal court as the procedural basis for the prosecution of crimes against the community of nations. In his view, satisfactory procedural provisions were a prerequisite for the acceptance of substantive criminal-law provisions. Another representative stressed that the resolution of many of the outstanding issues relating to the draft Code was linked to the establishment of an international criminal jurisdiction. To illustrate his point, he observed that if an international criminal jurisdiction were established there would be a greater willingness not to deal with certain matters in the context of the Code and to leave their determination to the relevant court hearing a case under the Code, whereas if the jurisdiction to hear such cases was to be vested in domestic courts there would be a reluctance to leave such matters for determination by those courts. Still another representative pointed out that there were mainly two reasons for the establishment of an international criminal jurisdiction: the first, a general one, related to the danger of unilateral, wrongful interpretations of the Code by certain States, especially given the highly political nature of the charges that could be brought under the Code; the second, more specific, reason was that some major crimes, such as drug trafficking on a large scale, threatened to exert pressure on the judicial system of some small States. In his view, the draft Code would be unacceptable without guarantees against unilateral and partisan interpretations.

123. Some delegations, although not adverse to the establishment of an international criminal jurisdiction, acknowledged that the issue was not a simple matter. The remark was made that the Commission's analysis, while pointing to the advantages of the establishment of such a jurisdiction, did not conceal the considerable number of problems connected with it, even if the court had only review competence. Agreement was expressed with the Commission's conclusion that establishing an international criminal court would be successful only if widely supported by the international community.

124. One representative elaborated on the difficulties involved as follows: it was necessary to guarantee that any international criminal jurisdiction would not be linked to political currents, and that its judges would retain their independence and integrity. Before any State chose to concede its own criminal jurisdiction in respect of any individual or group which had committed grave crimes against its people or territory, it would have to be confident that the international court exercising jurisdiction was entirely capable of doing so impartially. That again underscored the necessity for the instrument which would serve as the basis for such jurisdiction to be so clear and unambiguous so as not to be open to any form of interpretation other than on questions of fact and law directly related to the crime itself. Any ambiguity stemming from a partisan interpretation of the text, and any political loophole, could prejudice the status and authority of the court and reduce its effectiveness.

125. Several representatives concluded from the serious and complex nature of the problems involved that the Commission should proceed with utmost prudence and adhere to the solid juridical approach which such a delicate subject required. One of them, while recognizing that the establishment of an international criminal

jurisdiction would be a logical step since it seemed doubtful whether a Code unaccompanied by an international criminal jurisdiction would have the desired effect, warned that, given the highly sensitive nature of the question, the possibility of establishing an international criminal court in the foreseeable future had to be viewed with scepticism. He acknowledged that the favourable developments in international relations in general as well as the willingness of all segments of the international community to respond to grave breaches of international peace and security in accordance with the Charter of the United Nations and other available instruments might make future prospects for the exercise more realistic than ever before, but nevertheless wished to recommend a cautious approach.

126. Some among the delegations which highlighted the complex nature of the issues involved suggested that the right course of action would be for the Commission to finalize the draft Code first and only then undertake the possible elaboration of the statute of an international criminal court.

127. The idea of establishing an international criminal jurisdiction gave rise, on the other hand, to serious reservations. One representative drew attention to previous failures in establishing such a jurisdiction, which proved that despite the improvement in international relations profound differences still divided States with respect to various aspects of the issue, particularly the jurisdiction of the proposed court. He further remarked that even if such differences were overcome jurisdiction could not, under the domestic legislation of many States, be transferred from domestic courts to an international court, nor could special courts be established. He recalled that at the time of the adoption of the 1988 Convention it had not been possible to agree on the establishment of a universal jurisdiction to deal with drug trafficking because that offence had not been described as an international crime; the signatories to the Convention had therefore simply agreed to take the necessary steps in accordance with their domestic legislation to promote international cooperation in that field, while strictly adhering to the principle of the sovereign equality of States.

128. Another representative pointed out that the subject was highly controversial, given the existence of different legal systems and the likelihood that conflicts would arise with respect to the various aspects that would have to be considered in creating an international criminal jurisdiction. In her view, the current international situation had little impact on the profound differences of views regarding the scope of the proposed court, and it was thus premature to link the draft Code to such a mechanism. Doubts were also expressed as to whether the international community was ready to assume full responsibility for the envisaged undertaking, whether the court would be capable of standing above the political contingencies and the specific considerations of each State and whether the moment was right for the creation of a tribunal of that nature.

129. One representative pointed out that since the issue of establishing an international criminal jurisdiction was very complicated it might be premature to establish an international criminal court. He emphasized that effective systems based on the universal jurisdiction of domestic courts did currently exist for a large number of crimes, and that the establishment of an international criminal

court must not disrupt the satisfactory functioning of the existing systems. He further stressed that account must be taken of the fact that the establishment of an international criminal court would meet with resistance, since it would be seen by many as a serious curtailment of national sovereignty. While recognizing that it was necessary to set up an effective universal system for the suppression of crimes against the peace and security of mankind, he felt that the conclusion of extradition and mutual assistance treaties dealing with various types of proceedings was a good means to that end.

130. Along the same lines, another representative stressed that proposals for an international court must take into account the danger of disrupting the operation of the existing systems of implementation which had so far proved satisfactory. She viewed it as hardly realistic to imagine that an international criminal court could have coercive powers deciding on the conduct of States in matters that were in essence politically controversial. She pointed out that although the International Court of Justice did not have criminal jurisdiction the States Members of the United Nations could decide to confer such jurisdiction upon it, and that proposals to that effect had occasionally been made. She further remarked that even if the Charter was not modified the Court did have the power to deal with issues of international criminal law if those issues were submitted as damage actions or cases calling for injunctive relief, even though, as recent history had demonstrated, international criminal law was not self-executing or truly enforceable. She added that attempts to establish a coercive sanction apparatus to enforce obligations imposed by international law presupposed the existence of an international authority superior to sovereign States and that practical considerations would seem to favour more flexible and less onerous systems that were more compatible with international cooperation.

131. One representative reserved his position until the international community's attitude towards the issue at hand had become clearer. After stressing that one of the reasons why he had not in the past favoured the establishment of an international criminal court was that he doubted whether such a court would have enough support from States to be a meaningful institution, and after recalling that his scepticism concerning the whole exercise of codifying crimes against the peace and security of mankind stemmed from similar considerations, he indicated that his position on both issues was not however immutable and that his delegation was attentive to developments taking place in international relations and international law: if the international community was able to reach broad agreement, first, on a reasonable instrument defining a limited number of very serious crimes and establishing the penalties to be applied, and secondly, on a well-structured international criminal court offering guarantees of independence and impartiality, and capable of ensuring adequate application of the Code, his country might be prepared to join the consensus. Thus, he concluded, his delegation did not take an entirely negative view, even though it remained unwilling to express optimism at the current stage.

(b) Jurisdiction and competence

(i) Subject-matter

132. Several delegations felt that the court should have jurisdiction only over the crimes defined in the draft Code, even though the concept of international crime was broader than the concept of crime against the peace and security of mankind. The remark was made that, although such a choice might have the drawback of rendering the establishment of the court subordinate to finalization of the draft Code, the outcome of the Commission's efforts in this respect could be awaited with some optimism. Furthermore, in the view of some delegations, this was not strictly a drawback in view of the extent to which the substance of the law was linked to the corresponding implementation procedures and in view of the need, before establishing the court, to define the subject-matter on which it would be required to give judgement.

133. Some delegations were of the view that the proposed court should have jurisdiction not only over the crimes included in the draft Code but also over other crimes which States might decide to bring before it or which might be characterized as international crimes in other international instruments. One delegation, in particular, suggested that a combination of the options in paragraph 123, subparagraphs (i) and (iii), of the Commission's report would be desirable. These two options contemplated that the court would exercise jurisdiction over the crimes defined in the Code and that the court would be established independently of the Code, to exercise jurisdiction over all crimes in respect of which States would confer competence upon it, particularly under existing international conventions. In this connection, another delegation pointed out that it was quite possible, although not desirable, that some international crimes would be left out of the Code, in case States parties to the instrument defining the crime and also to the statute of the international criminal court might decide that such crimes should also come under the court's jurisdiction.

134. One delegation said that it might be desirable for the statute of the court to include a provision authorizing it to hear international criminal cases not dealt with under some other arrangements made by States, it being understood however that the court should have the option of refusing to hear such cases if it thought that its intervention would serve no useful purpose or that the case was not of an international character bearing on the peace and security of mankind.

135. Some other delegations felt that the court's jurisdiction should not necessarily, at least at the initial stage, extend to all the crimes to be included in the Code. One of them suggested that, in the case of certain crimes, reservations concerning the jurisdiction or competence of the court or the obligation to extradite envisaged in draft article 4 should be allowed.

136. Some of those delegations elaborated on the criteria to be applied in determining the category of crimes over which the proposed court would have jurisdiction. Thus, one representative felt that the draft Code should make a distinction between crimes committed by individuals who were in a position of authority (as agents or organs of the State) and crimes committed by individuals

not in a position of authority (having no link with the State). In his view, the court's jurisdiction would be useful in two cases: (a) in the case of crimes committed by persons in a position of authority, because it was unlikely that individuals who had committed crimes in the exercise of their functions as organs of a State would be prosecuted in the territory of that State unless revolutionary events had taken place; and (b) in the case of certain types of internationally organized crimes committed by persons not in a position of authority, in order to protect States in which prosecution might create problems for the stability of the political system.

137. Another representative suggested that the court's jurisdiction be limited to particularly heinous crimes which by their very nature constituted an affront to the world's conscience and a threat to the functioning of international society. He added that the court's competence should be established with the utmost clarity and be thoroughly spelt out in a very carefully drafted document.

138. For other delegations, crimes against peace, particularly the planning and waging of wars of aggression, which had generally not been addressed in domestic law and could thus hardly be dealt with by national courts, were most amenable to trial by an international court, which alone would have the authority and impartiality necessary to try them on behalf of mankind.

139. Some delegations were of the view that an international criminal court might initially be established to deal with some very specific crimes, without prejudice to a possible subsequent expansion of its jurisdiction. Reference was made in this connection to drug trafficking and narcoterrorism. Some delegations struck a note of caution in this respect. Thus, one representative said that major technical difficulties would arise if efforts were made to bring before an international court acts covered by the 1988 Convention since that instrument, as well as the articles proposed by the Special Rapporteur, did not clearly define the crime. He stressed that the content and definition of the crime were determined by national legislation and that an international court faced with an international drug-trafficking case might first have to lay down rules in the event of a conflict of legislation, which was not the role of such a jurisdiction. He added that the efficacy of recourse to an international court was also questionable unless an international system also existed to govern the execution of sentences and that it was illusory to assume that criminals would be treated equally, given the diversity of legislation. Another representative expressed similar doubts as to whether an international court would be a useful ally in the war against drugs. In his view national criminal jurisdiction could provide more appropriate and more effective ways of dealing with many international crimes.

140. Lastly, one representative pointed out that some international conventions provided for the possibility of submitting the prevention and punishment of international crimes to an international judicial body. He therefore suggested that the jurisdiction in question be established independently of the draft Code, so that it could cover any matter with regard to which States conferred competence upon it.

(ii) Competence and jurisdiction over persons

141. Some delegations favoured an approach which would confine the court's competence and jurisdiction to individuals. Thus, one representative said that the competence ratione personae should be defined in such a manner as to cover only individuals - which was the logical implication of article 3, paragraph 1, of the draft Code.

142. Some representatives took a positive approach to the question of extending the court's jurisdiction to States. One of them insisted that attribution of criminal responsibility to States would be an essential aspect of the draft Code. In his view, the best way to ensure that the future legal instrument was both credible and effective would be for the Code to provide for a dual regime, with criminal responsibility attributable to physical persons or to legal persons, including States.

143. Some delegations however advocated caution in this respect, stressing that it was realistic to limit the court's jurisdiction to individuals without involving States for the time being. One representative pointed out that the question of jurisdiction over States would have to be taken up in the wider context of the criminal responsibility of States and of the applicability of the Code to States as the perpetrators of crimes against the peace and security of mankind. In his view, no useful purpose would be served by consideration of the question at the current stage.

144. Several delegations were in favour of extending the court's jurisdiction to legal entities other than States, at least for crimes such as terrorism or drug trafficking, in view of the extensive reach of such crimes. One delegation, in particular, stressed that a great deal of international criminal activity was carried on by organizations which might or might not be legal persons and that it would be useful for the Commission to consider jurisdiction in relation to such organizations. The same delegation pointed out that, where such an organization was not a legal person - for example, a company - but was rather a criminal association of individuals, proceedings would have to be instituted against each member of the association on an individual basis and not against the association or organization.

(iii) Nature of jurisdiction

145. A number of delegations favoured an international criminal court with exclusive jurisdiction. It was said in support of this approach that if a court were established it should be given full responsibility for the administration of justice within the scope of its competence and that there would be no point in having a court with only nebulous jurisdiction to hear international criminal cases brought before it on a case-by-case basis or pursuant to bilateral arrangements between States. The exclusive jurisdiction approach was also viewed as best guaranteeing the independence of the proposed court.

146. One representative, while favouring a court with exclusive jurisdiction, recognized the difficulties involved. After observing that States would have to

cede their domestic criminal jurisdiction in relation to crimes falling under the jurisdiction of the court, he drew attention to the question of reconciling the surrender by States of national jurisdiction with existing obligations under treaties which gave jurisdiction to each State party in specific cases over certain crimes. Referring to the question whether article 30 of the Vienna Convention on the Law of Treaties, which dealt with the application of successive treaties relating to the same subject-matter, was relevant, he expressed doubts as to whether the international conventions in relation to which States might have to surrender their jurisdiction over certain crimes could be viewed as dealing with the same subject-matter as the Code, since the Code, and hence any international convention adopted to implement it, was far more ambitious than any of the international conventions in question. After indicating that, to the extent that those international conventions and the Code could be viewed as dealing with the same subject-matter, the provision of article 30 of the Vienna Convention that would most likely apply would be paragraph 4, he suggested as the most practicable course the insertion in the Code of a provision along the lines of article 311 of the United Nations Convention on the Law of the Sea stipulating that the Code, or rather the convention establishing the Code, should prevail, as between States parties, over those international conventions. Another possibility which he mentioned would be to amend the international conventions which gave States jurisdiction over specific crimes so as to confer such jurisdiction upon an international criminal court established under the Code, it being understood that if, as was likely, the amendment was done by some of the parties only, the provisions of article 41 of the Vienna Convention would apply. The same representative pointed out that a subsidiary but important difficulty of exclusive jurisdiction was that, although the Commission's report spoke simply of States ceding their jurisdiction to an international criminal court, it might not be easy to determine which State had jurisdiction under the relevant international convention.

147. One delegation favouring exclusive jurisdiction said that its position was without prejudice to the principles of the sovereignty of States and the self-determination of peoples, and presupposed that the decision to take cases to the court lay with States themselves.

148. Some delegations on the other hand questioned the advisability of the exclusive jurisdiction approach. One of them pointed out that it would be counterproductive to establish an over-ambitious and unrealistic mechanism. Another delegation felt that exclusive jurisdiction should not be considered, so as to avoid devaluing or even disrupting domestic efforts to suppress the crimes in question, or reducing the effect of judgements handed down by domestic courts. In that delegation's view, it would be paradoxical if the existence of a court were to have a "demobilizing" effect on State judicial authorities.

149. A few delegations pronounced themselves in favour of concurrent jurisdiction between an international criminal court and national courts. Such an approach, it was remarked, would enable States parties to the court statute not to renounce their national jurisdictions and to decide, on a case-by-case basis, whether to institute an action before the international criminal court or to exercise their own jurisdiction. One representative, after recalling that the 1948 Convention on

the Prevention and Punishment of the Crime of Genocide and the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid had been implemented by States through their national courts even though each Convention had provided for the establishment of an international court, acknowledged that, given the existence of crimes of such wide dimensions that they endangered the very existence of States and peaceful international relations, an international criminal jurisdiction might perhaps provide a valuable recourse for small States in the future. Another representative saw merit in providing States with a third alternative to trial by domestic courts and extradition and giving them the option of conferring jurisdiction on the international criminal court.

150. Other delegations however expressed reservations on the concurrent jurisdiction approach. One of them remarked that such an approach would give rise to difficulties in the event that one party wished to bring an action before a national jurisdiction, while the other party wished to bring it before the international court. The same delegation drew attention to the risk of divergent interpretations.

151. A number of delegations favoured an international criminal court having only a review competence. One representative observed that such a system would allow for the harmonization of the practice of national courts in cases of crimes against the peace and security of mankind, and would also make possible a mechanism for monitoring compliance by the parties to the Code with their obligation to suppress crimes against the peace and security of mankind, and to prosecute the perpetrators of such crimes. He further remarked that if the right of appeal to such an international court was granted to persons charged with the commission of a crime, the procedural guarantees of due process, objectivity and fairness would be strengthened and the problems of compliance with article 14 of the International Covenant on Civil and Political Rights which would arise if such persons had been tried in first instance by an international criminal court would be disposed of. The same representative found unconvincing the argument that the problems in question could be eliminated through the establishment of a first-instance chamber within the framework of an international court, with appeals being heard by the plenary court. In his view, plenary sessions could never ensure the full participation of judges, since those who had been present in the chamber at the time of the original judgement would have to be excluded later.

152. Another representative favouring an international court of appeal that would review domestic judgements pointed out that a case could be reviewed because: the State concerned had grounds for believing that the decision in question had not been based on a proper appraisal of the law or the facts; the acts had been tried as ordinary crimes and not on the basis of the Code; or the individual or individuals convicted had filed an appeal. While recognizing that it could be argued that the existence of a jurisdiction having a review competence might diminish the authority of <u>res judicata</u>, particularly where the decision in question had been handed down by the supreme court of the State concerned, he felt that the establishment of such a court would be altogether in keeping with the contemporary evolution in the relevant area of law, which increasingly permitted individuals to have decisions of their domestic courts reviewed by an international jurisdiction. He further pointed out that the court of appeal would offer the additional

advantage of giving individuals convicted by domestic courts the possibility of having their cases reviewed and could also, where appropriate, settle positive or negative disputes between States concerning competence.

153. Various combinations of the approaches described above were envisaged. Thus one delegation, after pointing out that the question of the nature of the issue called for political, not legal answers, remarked that the concepts of a court with concurrent jurisdiction and one having only review competence were not mutually exclusive, and could be contemplated. Another delegation was of the view that the proposed court should have exclusive jurisdiction over crimes against peace and concurrent jurisdiction over crimes against the security of mankind. Still another delegation, after stating that concurrent jurisdiction would not be impossible provided the respective spheres of competence were clearly delimited, drew attention to the possibility of the international court's acting as a court of first instance where national courts failed to take up a case involving the commission of an international crime.

154. Some delegations favoured endowing the international criminal court with competence to provide United Nations organs or domestic courts with legal opinions either of an advisory or of a binding nature. One delegation felt that such advisory services should be provided only on the basis of recognition of an exclusive original jurisdiction of the court to determine the guilt of persons charged under the Code, i.e., in respect of international crimes remaining outside the Code or crimes whose international character was in dispute. The same delegation felt that the advisory or review services should not be extended to States which did not recognize the court's exclusive jurisdiction under the Code.

(iv) Submission of cases

155. Some delegations pointed out that all States parties to the court's statute should have the right to submit cases. It was however remarked that there might be instances in which a State which was not a party to the statute might wish to have locus standi before the court because it had an interest in the proceedings.

156. One delegation was of the view that it was not necessary to require the consent of the States concerned. While agreeing that unilateral submission of a case by any State party to the statute of the court was unquestionably a legal innovation, the implementation of which threatened to create difficulties, he observed that that approach was part of the trend towards vesting in States an objective right to the maintenance of peace. In his view, the question arose more specifically in connection with article 12 concerning cases in which the Security Council might conclude that an act of aggression had been committed.

157. The view was expressed that only States parties should be allowed to submit cases to the court in view of the obstacles that would be encountered in trying to extend the jurisdiction of the court to States and since even in the best of democracies it would be very difficult to punish the State as such for a criminal offence, except by identifying the individual officials closely connected with the perpetration of the crime. Such an approach, it was remarked, would also obviate the problem of ensuring the enforcement of judgements handed down by the court

without incurring the additional expense of establishing an international police force and prison service, and would leave open the possibility for intergovernmental organizations and individuals to report to the court or another associated body, for investigation, any alleged contraventions of the Code which were ignored or improperly investigated by a State party. Another delegation, also insisting on the useful role which could be played in certain situations by intergovernmental organizations, drew attention to the valuable example provided by the Inter-American Commission on Human Rights.

158. Stressing the need to distinguish between the bringing of a case to the attention of the court and the actual initiation of proceedings, one representative felt that the expression "submission of cases", which was not, perhaps, altogether well chosen, appeared to refer only to the first of those steps. He stressed that in any event the court should be assisted by an organ charged with criminal prosecution, tentatively described by the Commission as the prosecuting attorney's office, and that it would fall within that organ's attributions, once it had decided that grounds for instituting proceedings were present, to actually bring a case before the court. Thus, he concluded, the question of "submission of cases" in the sense in which it was employed by the Commission was of limited importance and some latitude could be accepted in that regard, provided there were safeguards to prevent frivolous initiatives from overburdening the prosecuting attorney's office.

159. Another representative found it difficult to express a preference for any one of the options mentioned in paragraph 135 of the Commission's report even though he felt inclined towards the approach described as "the most liberal" in paragraph 137 of the report. In his view, the issue should be further examined with a view to presenting a model that would be suited to an international criminal jurisdiction.

160. As to possible restrictions on the right to submit cases, one representative pointed out that the prosecution of serious international crimes might require prior authorization. In his view, careful consideration should be given to that question, given the nature of certain high crimes and the status of those most likely to be accused of committing them. He pointed out that one possibility was for the decision to prosecute them to be taken by a body representing the international community, such as the Security Council.

(c) Structure of the court

(i) Institutional structure

161. As regards the question whether the proposed court should be a permanent or an ad hoc body, some delegations opted for the first alternative. One delegation, on the other hand, believed that serious thought should be given to the possibility of establishing specialized ad hoc international criminal jurisdictions. Still other delegations felt that it was still too soon to determine whether the court should be a permanent or an ad hoc organ and that the answer to that question would depend on the extent to which the idea was accepted by States and on the financial implications of a permanent court.

162. As regards the mode of establishment, several delegations favoured the view that the court should be created by way of a convention. It was said in this connection, that since countries were generally reluctant to submit their disputes to strangers who were not parties to an agreement with those in dispute, a convention was the most appropriate instrument by which to establish the court and to adopt the Code. Another remark was that, although the court should be established within the framework of the convention adopting the Code, its statute could be embodied in an additional protocol providing for the establishment and organization of the court or simply accepting the jurisdiction of the court, should it have been established under the original convention.

163. Some of these delegations indicated that they would not object to alternative modes of establishment, for instance, under the Charter of the United Nations, or by means of a resolution of the General Assembly, if that might speed up the process of setting up the court. The idea that the court should be a permanent body established by an amendment of the Charter of the United Nations was supported by some but gave rise to reservations on the part of others who felt that the court should not be established as an organ of the United Nations because that would entail the necessity of adopting a complicated set of amendments which would not make any positive contribution.

164. Some delegations were in favour of establishing the court by means of a separate convention, which would be open to all States Members of the United Nations.

165. One representative indicated that he had no special preference as to whether the court should be set up under a convention or a resolution of the General Assembly since no amendment of the Charter would be required. He insisted however that the proposed court be established under the aegis of the United Nations with a strong link to the Organization. In this connection, the remark was made that the nature of the relationship between an international criminal jurisdiction and the United Nations required detailed analysis with regard to several aspects, including the question concerning General Assembly or Security Council authorization for the submission of cases.

(ii) Composition of the court

166. Some delegations said that the court should be of moderate size, consist of a limited number of judges and be representative of the main legal systems and civilizations of the world. The remark was also made that the judges should be drawn from the broadest possible field and could sit as and when their services were required, rather than residing permanently at the court's headquarters.

167. One delegation, after indicating that it favoured the double-hearing principle as a guarantee of the individual's right to a fair and impartial trial, suggested an arrangement whereby all cases could be tried in chambers of the court, with appeals being heard by the plenary court - an arrangement which would also allow accused persons some choice as to who would be their judges.

(iii) Election of judges

168. One delegation suggested that the judges be elected by the parties to the court's statute, and another favoured the system applied for the elections to the International Court of Justice. One delegation observed that one of the alternatives proposed by the Special Rapporteur in his eighth report, whereby the judges would be elected by the General Assembly of the United Nations, by an absolute majority of those present and voting, would guarantee the court's impartiality.

169. Another delegation, after pointing out that the relationship between an international criminal jurisdiction and the United Nations required detailed analysis also with regard to such questions as the election of judges and the composition of the court, stressed that elections on the basis of the current geographical representation in the United Nations would not guarantee a truly universal choice of judges.

(iv) Organs charged with criminal prosecution

170. One delegation, after stating that neither the common-law nor the civil-law model appeared to be suitable, suggested that a system should be adopted that would work under the existing circumstances, ensuring the independence of the court from States and investing it with an international character.

(v) Pre-trial examination

171. One delegation stressed that pre-trial examination procedures should be carried out by the referring State in accordance with its law, that State being required, in any case, to produce evidence capable of supporting a conviction. Another delegation stated that the statute of the court should ensure the rights of the accused, for example, the right to an attorney of his own choosing and the right to be presumed innocent until proven guilty. The remark was made in this connection that it would be useful for the Commission to deal specifically with the question of the standard of proof required for the conviction of persons tried under the Code and to specify the particular standard (for example, proof beyond a reasonable doubt) by which proof of guilt was to be established.

172. One delegation expressed the hope that the Commission would explain more clearly what was meant by pre-trial examinations, adding that a comparison with domestic legal systems might not help, since different legal systems treated so-called pre-trial examinations differently.

(vi) Legal force of judgements

173. One delegation pointed out that the judgements of the court should have the effect of precluding any new prosecution for the same or a related offence arising out of the same facts, in accordance with the principle of non bis in idem.

174. Some representatives commented on the relationship between the decisions of the court and the internal legal order of States. One of them said that the

judgements of the court should take precedence over those of other courts. Another, after indicating that certain of the decisions of the Inter-American Court of Human Rights were binding and that his country accorded them the same status as those of its highest domestic courts, said that the proposed international court should have similar guarantees if its decisions were to be respected. The observation was made in this connection that in certain jurisdictions it would be necessary to adopt constitutional amendments so that judgements of the court would be recognized by national courts.

175. As regards the respective review powers of the court and of national courts, different views were expressed. One representative said that where there was concurrent jurisdiction national tribunals should not be able to re-examine decisions of the international court, whereas the international court should have the power to re-examine a decision of a national court, provided that the principle of non bis in idem prevailed. Another delegation held that where the international criminal court had exclusive jurisdiction the national court would be bound by the decisions of the former, whereas in cases where the international court was invested with review powers the decisions of the national court could be re-examined and modified by the international court, but not vice versa.

176. On the other hand, one representative pointed out that, although he could support the view that a national court should not be able to re-examine a decision of the international court, he was unable to agree that the international court ought to be able to re-examine a decision of a national court. Along the same lines, another representative pointed out that if an international court was to be established its existence should not in any way affect the jurisdiction of national criminal courts, particularly with regard to the finality of their judgements, where those courts already had jurisdiction under relevant treaties. He drew attention to the relevant examples which could be found under the Geneva Conventions and under various international conventions which provided for jurisdiction under the principle aut dedere aut judicare.

(d) Other questions

(i) Penalties

177. Several delegations indicated that the Code should provide for penalties since its value as an instrument for the punishment of crimes depended upon it.

178. Some delegations were of the view that in the same manner that the Commission was drafting a list of crimes against the peace and security of mankind, it should also elaborate a general list of applicable penalties, leaving the judge free to apply the appropriate penalties in each particular case. Other delegations believed that it would be preferable to fix a penalty for each crime. Reference was made in this context to the rule nulla poena sine lege and to the principle that the penalty should be proportionate to the gravity of the crime committed.

179. As for the death penalty, some delegations felt that it should be ruled out and that its exclusion from the Code would in no way detract from the seriousness of the crimes concerned or from the determination of the international community to

put an end to the causes of international criminality. One representative suggested that the matter might be viewed in the light of the penal policy of the submitting State, taking into account the possible existence of systems in which capital punishment was applicable for crimes against humanity of a particularly grave and serious nature. He suggested that the question might be analysed by the Commission in considering the question of penal provisions and in the light of the draft statutes prepared in 1950 and 1953.

180. One delegation also suggested that life imprisonment should be ruled out, since the objective of a penalty was to rehabilitate the offenders.

(ii) Implementation of judgements

181. Some delegations felt that the judgements of the court should be implemented under national systems. The remark was made in this connection that as long as international law depended upon national institutions for its enforcement an international criminal court also had to depend upon national systems for implementing its judgements. Some delegations held that any penalty of imprisonment imposed should be served in the prosecuting State's penal institutions in accordance with the Standard Minimum Rules for the Treatment of Prisoners, although States parties could have the option of providing for other forms of detention. It was also suggested that convicted offenders might serve their terms of imprisonment in other countries if their own Governments would have difficulty in enforcing the sentence of the court - an arrangement which would be cheaper than an international police force and prison service.

182. Some representatives, on the other hand, said that they had difficulty in identifying the practical means of enforcing the decisions of an international criminal court. One of them held that it would not make sense to resort to national facilities of States for the implementation of such judgements. Another felt that an international detention facility would be required, and that States should submit their recommendation on that point.

(iii) Financing of the court

183. Some delegations stressed the importance of the question and the need to study it in a detailed manner in the future. One view was that the proposed court should be financed from the United Nations budget, a solution which, it was stated, might ensure the continuity in financing. Another view was that the court should be funded for the most part on a "user pays" basis.

(e) Other possible international trial mechanisms

184. Some delegations felt that international criminal justice should be entrusted to a single organ - possibly divided into chambers for a speedier adjudication of cases - rather than to separate courts. In this connection, the remark was made that the creation of alternative international trial arrangements outside the ambit of the proposed court might undermine the usefulness of the court and make its existence questionable.

185. As for the idea of entrusting the International Court of Justice (ICJ) with jurisdiction in criminal matters, it gave rise to reservations on the part of some delegations. It was stated in particular that the members of ICJ had not been elected with a view to the exercise of criminal-law functions and that an international criminal trial system should be composed of persons who had been elected on the basis inter alia of their qualifications to carry out the functions of judges in such a system. The remark was also made that entrusting the International Court of Justice with jurisdiction on criminal matters would necessitate amending the Statute of the Court, and that the requirements for the exercise of criminal jurisdiction on the international plane - namely, a mechanism for prosecution, a body of judges thoroughly experienced in the administration of criminal justice and, above all, an environment that was appropriate to criminal trials - were not met by existing international mechanisms.

186. On the other hand, one representative, after pointing out that the Commission's proposals on a possible international court should not stray too far from existing customary and treaty law, or from what States had indicated they were prepared to implement, felt that perhaps the most logical approach would be to provide the International Court of Justice with additional jurisdiction to deal with international criminals. He added that the Court might well be able, under its existing mandate, to determine in individual cases whether a crime was covered by international law, thus obviating the need to elaborate a code of crimes.

C. JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

1. General comments

187. Many representatives welcomed the substantial progress achieved by the Commission at its last session in its review of the draft articles adopted on first reading, and expressed the hope that a final set of articles would be submitted to the General Assembly at its forty-sixth session. It was noted that the growing cooperation between States as well as the ever greater number of international transactions had made it increasingly necessary to formulate rules of international law relating to State immunity which would substantially facilitate international trade relations.

188. A number of representatives stressed that the Commission should make every effort to formulate a text which would accommodate the differing positions of States. That, it was recognized, was not an easy task, because the topic impinged on the most fundamental issue in international law, namely, sovereignty: while jurisdictional immunity which States and their property enjoyed in the courts of another State derived from the principle of sovereignty, differences existed as to the emanations of sovereign and governmental authority to which jurisdictional immunity should apply.

189. It was accordingly suggested that in order to arrive at a broadly acceptable set of draft articles the Commission should develop compromise solutions which could serve the collective interests of the international community and, to that end, take into account the practice and relevant legislation of all States. In this connection, one representative drew attention to the adoption in his country earlier in the year of a new national law on property and to the still more recent adoption of a document dealing with the introduction of a market economy; the latter document had established the general principle that each of his country's republics could implement its own programme and also affirmed the recognition of multiple forms of property ownership, including private ownership. Another representative announced that radical changes would be made to his country's laws in order to create the conditions for a transition to a market economy, which would have consequences for its national policy with regard to the topic. Still another representative indicated that the rules governing the jurisdictional immunities of States and their property were not codified in a single law in his country; rather, they were included in its law on private international law and civil procedure and its law on administrative procedure, both of which gave priority to international conventions. He added that the results of the United Nations codification efforts on the subject would have an important influence on his Government's decision whether to adopt a separate law on the topic.

190. Many representatives stressed that an adequate balance should be struck between two categories of interests, namely, those of the foreign State, which wished to enjoy the broadest possible jurisdictional protection in other States, and those of the forum State, which wished to ensure its overall jurisdiction. There was a wide measure of support for the Commission's pragmatic approach in seeking a consensus as to which types of State activity should enjoy immunity and which ones should not, without going too deeply into theoretical matters concerning general principles of the jurisdictional immunities of States. The hope was

expressed that an equally realistic approach would prevail in efforts to complete the second reading of the draft articles. Also advocating practical solutions, one representative remarked that, bearing in mind the absence of unanimity on the scope of State immunity, the progressive development of international law in this field could only mean achieving a greater degree of unanimity in the law, the aim being to reach a compromise and arrive at a flexible text which would to some extent reflect divergences of views, the consequences of which would be taken care of through rules concerning reciprocity.

191. Some representatives were concerned that, while progress had been made on a significant number of draft articles, there still appeared to be divided views in the Commission on the underlying doctrinal and legal bases for the topic. The debate in the Sixth Committee confirmed that views were indeed so divided. Thus, according to one representative, international law had developed in such a way that the old rule of absolute immunity had become obsolete; a substantial body of State practice, as well as a number of developments in international law, supported the principle that those who found themselves involved in a dispute with the Government of a foreign State, acting in a non-sovereign capacity, should be able to have that dispute determined by the ordinary processes of law. Similarly, another representative maintained that there had been a recent tendency in international law to limit the immunity of States from the jurisdiction of the courts of other States - a necessary development in view of the increase in international exchanges and cooperation among States. His delegation, therefore, favoured a limiting approach to the principle of State immunity, a practice which was also followed by the courts of his country.

192. Some representatives on the other hand stressed that in the efforts to develop a legal regime relating to jurisdictional immunities of States and their property the principle of State immunity under international customary law should be emphasized and strengthened and, on that basis, some provisions should be developed, in the light of the different social, economic and legal systems of various countries regarding the exceptions to the principle of State immunity, with a view to striking the necessary balance between efforts to seek fair and reasonable settlement of disputes and the elimination of abuse of domestic judicial procedures of a State against another sovereign State.

193. Referring to this divergence of views, one representative disagreed with the statement in paragraph 217 of the Commission's report that the industrialized countries were inclined towards restrictive immunity. He remarked that eminent jurists rejected the division between wealthy industrialized countries supporting State immunity and the poorer developing countries opposing it, and that the time had come to set aside such a false and ideological understanding and to deal with the issue - which was of a legal and technical character - from the point of view of jurisprudence rather than of political attitudes, particularly in a world in which ideological differences were converging.

194. The hope was generally expressed that, despite the divergence of views between States which subscribed to absolute sovereign immunity and those which subscribed to restrictive sovereign immunity, the Commission would be able to formulate proposals leading to a resolution of that difficult issue.

2. Comments on the draft articles provisionally adopted by the Commission on first reading or referred to the Drafting Committee in the course of the second reading

PART I. INTRODUCTION

Article 1. Scope of the present articles

195. The current wording, which refers to "the immunity of one State and its property from the jurisdiction of the courts of another State", was viewed by some representatives as calling for improvement. The remark was made that it was incorrect to include within the scope of coverage of the present articles the immunities of State property, since only States themselves, and not their property, could be subjects of law.

196. Referring to the text recommended by the Special Rapporteur, one representative indicated that he did not agree with the inclusion of immunity from measures of constraint in the definition of the scope of the draft articles. Nor did the reference to immunity from jurisdiction of the legislative or institutional organs of another State, proposed by one member of the Commission, seem to him to be appropriate.

Article 2. Use of terms

Article 3. Interpretative provisions

197. While most of the representatives who commented on these draft articles supported both the merger of articles 2 and 3 as adopted on first reading and the replacement of the phrase "commercial contract" by the phrase "commercial transaction" (which, one representative said, was not adequately translated into French by the term "operation commerciale"), reservations were made on two points. The first concerned the definition of "State", in particular subparagraphs (b) (i) *bis* and (b) (ii) of paragraph 1, and the second the "nature" and "purpose" criteria referred to in paragraph 3.

198. As regards the first point, one representative felt that the definition should not include State enterprises and corporations, because as independent legal persons, such entities could both institute a proceeding and be sued against and should not, therefore, enjoy jurisdictional immunities. He remarked that to confuse those independent legal entities with States and thereby subject them to State immunities amounted in practice to confusing the liabilities of those entities with those of States. He therefore urged that a clear distinction be drawn between "State" and "State enterprise and corporation" with regard to jurisdiction and the limits to liability. Another representative expressed concern that subparagraphs (b) (i) and (b) (ii) of paragraph 1 would constitute an extension of State immunity under the law of his country, where, in principle, the courts regarded the territorial subdivisions of a foreign State as being subject to their jurisdiction.

199. On the second point, a number of representatives found it difficult to accept the current wording. Some felt that the "purpose" criterion should be eliminated. It was pointed out in this connection that, since the determination of whether an activity was a "commercial transaction" was currently governed not by an agreement between the States concerned but by their practice, it would be hard for contracting parties to predict how an activity would be classified, and this would result in great legal uncertainty. Another view, however, was that the nature of the transaction should not be the primary test for determining whether or not a transaction was commercial and that it would be desirable also to take into account the purpose of the transaction in order to separate the acts of the State de jure imperii from acts de jure gestionis.

PART II. GENERAL PRINCIPLES

Article 6. State immunity 5/

200. The deletion of the phrase "and the relevant rules of general international law" was supported by some representatives on the ground that its retention might lead to divergent and unilateral interpretations by national courts of international law and would unduly restrict acta jure imperii. The remark was however made that in view of the fact that article 6 was related to the other articles it might be better to wait until consideration of the remaining articles had been completed before deciding whether the phrase should be retained.

PART III. [LIMITATIONS ON] [EXCEPTIONS TO] STATE IMMUNITY

201. Some representatives stressed that care should be taken to ensure that the exceptions to State immunities were well balanced since they departed from the long-established principle of absolute State immunity.

202. While the approach taken by the Commission so far met with the agreement of a number of representatives, it also gave rise to reservations. One representative, after reaffirming that the guiding principle in that area was that of immunity accompanied by exceptions whose consequences should be carefully measured, observed that the current report offered a number of exceptions to the principle of immunity which were worthy of note. He stressed that, while the first category consisted of exceptions which, in view of their origin - either in the legislation or in the practice of a limited number of States - did not lend themselves to international codification of universal scope, i.e., the exceptions in article 13 and subparagraphs (c), (d) and (e) of paragraph 1 of article 14, a further category of exceptions should be re-examined, as they tended to impose a considerable restriction on the principle of State immunity, so much so that the legal system which would be applicable to States, if such provisions were to be included, would

---

5/ Article 6 of the draft as adopted on first reading has been renumbered as article 5 by the Drafting Committee as a result of its decision to combine articles 2 and 3.

not adequately safeguard the sovereignty of States. In his view, it was similarly inappropriate to rely on the judge in the court of the forum State to determine the illicit character of an act or omission of a foreign State since in international law it was recognized that only clearly established rules and procedures applied in that field. He added that his delegation had noted a tendency, not confined to the draft articles but apparent in only a small number of States and thus unrepresentative, to limit the jurisdictional immunity of States before the courts of other States. He left it up to the Commission to re-examine the current wording of some of the provisions and to submit a more balanced version which would more closely reflect the international consensus on such issues, and would thus be more likely to gain the acceptance of States.

203. Another representative reiterated his concern about the direction given to the work so far accomplished by the Commission on the topic, which it was in his view difficult to incorporate in the codification exercise, since the draft articles formulated to date on the matter, such as articles 1 to 11, far from corresponding to the general practice of States, simply reflected the legislative practice of some States. He added that there had been a mistaken attempt to represent the relativity of immunities as an absolute while disregarding the general trend followed by the members of the international community.

204. As regards the title of Part III, one representative favoured the alternative "Limitations on State immunity"; two expressed preference for the alternative "Exceptions to State immunity"; and another suggested the phrase "Restrictions to State immunity". A number of representatives advocated more neutral formulations such as "Activities of States in respect of which States agree not to invoke immunity" or "Cases in which State immunity may not be invoked before the courts of another State".

Article 11. Commercial contracts 6/

205. One representative said that, while he had no objection to the article, the scope of the concept of a "commercial transaction" was not very clear. He noted that different definitions in that regard were used in the national legislations of the United Kingdom of Great Britain and Northern Ireland, Australia and Canada.

Article 11 bis. Segregated State property

206. Most of the representatives who spoke on this proposed new draft article favoured its inclusion, although one of them stated that he remained unconvinced of the need for such a provision and believed that the Commission should give further thought to the matter.

6/ Article 11 of the draft as adopted on first reading has been renumbered as article 10 by the Drafting Committee as a result of its decision to combine articles 2 and 3.

207. In support of the inclusion of the draft article, one representative recalled that the concept of segregated State property had achieved wide recognition in a number of countries and was also reflected in certain international instruments, in particular in article 2 of the 1978 Protocol amending the Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, article 1 of the 1969 International Convention on Civil Liability for Oil Pollution Damage, and articles 1 and 2 of the 1973 Convention relating to the Limitation of Liability of Owners of Inland Navigation Vessels. He pointed out that the essence of the concept was that a company possessing segregated property could not invoke immunity and that State liability was not engaged in connection with that company's obligations.

208. Another representative observed that many States conducted aspects of their affairs through separate corporations established under their own law and having title to their own property. He therefore favoured recognition of the institution of State enterprises with segregated State property in the draft articles - a change which might well enable some States to accept other proposed provisions, especially those concerning execution against property set aside for use by State enterprises.

209. The revised formulation of the draft articles submitted by the Special Rapporteur was considered as an improvement over the original version.

210. A number of suggestions were however made with a view to clarifying the text and its implications. One representative emphasized that, as a minimum requirement for granting immunity, transparency must be ensured with regard to the capital resources of the State enterprise, for example, by means of a commercial register. Referring to the second sentence of the revised formulation which established an exemption from immunity in the event of claims on the State where a State enterprise acted on its behalf, he remarked that, while this exception was welcome, the transaction would generally be concluded in such cases in the name of the State, which would therefore be the contracting party and would not be granted immunity under article 11. Another representative suggested that paragraph 2 should provide that States should not be held responsible for State enterprises and corporations and that no proceeding could be instituted against a State before a court of a foreign State in connection with disputes with those enterprises and corporations. A further suggestion was that, while the issues of substantive liability which might arise from recognition of the separate status and property of State enterprises were not regulated by the current draft articles, it might be desirable to add a saving clause to make clear that the draft articles were without prejudice to the attribution of any liability to a given legal entity under the law governing the status and transactions of that entity.

Article 12. Contracts of employment

211. Some representatives felt that the inclusion of the article among exceptions to State immunity were not justified. It was pointed out in this connection that such a provision did not have sufficient basis in practice and that, with regard to the guarantee of the interests of the employee, disputes relating to the contract

of employment could, as stated in paragraph 175 of the Commission's report, be settled by mutual agreement or by insurance coverage.

212. A number of other representatives considered a restriction of the principle of immunity from jurisdiction in the case of labour disputes legitimate, as national courts were in practice the only bodies which could provide effective recourse for some categories of employees of a foreign State. Disagreement was expressed with the view that there was a scarcity of judicial practice or evidence of State practice concerning the labour law disputes provided for in the draft article. Such a claim, it was stated, might have been sustainable some 10 years ago but was no longer valid.

213. Among the supporters of the article, several insisted on the need to strike a balance between two equally valid concerns: that of protecting the interests of employees of a foreign State and respect for the social legislation of the forum State on the one hand, and that of avoiding abusive intervention into activities connected with the exercise of governmental authority by the foreign State on the other. Some representatives considered the balance achieved in the text adopted by the Commission as satisfactory, but others favoured a greater limitation of immunity than that contemplated in the current text.

214. More specific comments focused on the reference to social security provisions at the end of paragraph 1 and on the exceptions contained in subparagraphs (a), (b) and (c) of paragraph 2.

215. On the first point, some representatives felt inclined to support the Special Rapporteur's proposal for the deletion of the reference to social security requirements. One representative pointed out that such requirements could raise problems where proceedings were instituted to request the State to include the employee in its social security system. While agreeing that the reference to the criterion of coverage by social security appearing in paragraph 1 was inadequate, some representatives took the view that it could not simply be deleted. One of them suggested that the International Law Commission should consider the possibility of taking into account not coverage by social security but the absence from the contract of exorbitant provisions of domestic common law. Another representative proposed that the current reference be replaced by a reference to the social laws and provisions regulating employment contracts.

216. As regards the exceptions contained in paragraph 2, the view was expressed that they should be kept to a minimum lest they nullify the non-immunity principle in paragraph 1.

217. With respect to subparagraph (a), some representatives commented on the reference to governmental authority and its implications in the context of diplomatic and consular law. One of them, after stating that the criterion for the inclusion or exclusion of labour disputes should not be the nature of the employer but the nature of the work performed by the employee and whether or not it was associated with the exercise of governmental authority, stressed that embassies and other State agencies overseas employed individuals to perform work of the same kind performed by the colleagues in the private sector and which was not associated with the exercise of governmental authority. He added that the acceptance of that

criterion would accord with the prevailing trend in the legislation relating to immunity adopted by a number of States in various parts of the world. Another representative expressed agreement with the view of some members of the Commission that labour law disputes particularly between locally appointed employees and foreign diplomatic or consular missions, should be settled without violation of the immunity of the sending State under international diplomatic law.

218. While some representatives took the view that subparagraph (a) should be deleted, others felt that it should be reworded so that it did not nullify the principle of non-immunity in paragraph 1. While some expressed interest in the reformulation proposed by the Special Rapporteur (para. 177 of the Commission's report), one representative, although viewing that reformulation as helpful, felt that it was too restrictive in comparison with the general wording approved on first reading.

219. As for subparagraph (b), some representatives favoured its deletion. Others, however, felt that it embodied an essential idea. One representative, for examnple, said that it would be difficult to accept the hypothesis that a State could be forced by the court of another State to employ, retain in its employment or re-employ a locally recruited employee. He felt that in such cases the rule of non-immunity could be applicable only in respect of quasi-governmental institutions such as cultural, scientific or tourist agencies, particularly those involved in commercial activities. Another representative indicated that it did not seem normal for a court to be able to impose on a foreign State the reinstatement to a mission of a person who no longer enjoyed its confidence.

220. Some representatives were of the view that the wording adopted on first reading lent itself to interpretations that would rule out such possibilities. Thus, one representative indicated that he construed the text as not detracting from the freedom of States to recruit or not to recruit an employee and to renew or not to renew the contract of employment, which meant that the courts of the State in whose territory the contract was performed could only be seized of questions relating to the rights accorded to the employee by the contract of employment and not by the recruitment itself.

221. Other representatives felt that the current wording was too sweeping. One of them, after stressing that recruitment termination and the renewal of contracts of employment were discretional acts of the employer State, and hence it would be difficult to bring a case against those acts, suggested that in order to avoid arbitrary acts it would be desirable first to establish at least the obligation to notify the employee of the reasons for his dismissal or non-renewal of his contract, and second to indicate which rights of the employee must be effectively protected. Others expressed interest in the Rapporteur's proposal (para. 182 of the Commission's report) whereby a proceeding should be allowable only to the extent that the purpose of the act was pecuniary compensation, unless the court was authorized to issue an order against the foreign State, a proposal which, it was stated, seemed attractive despite the difficulties it might raise.

222. Regarding subparagraph (c), some representatives favoured the deletion of the reference to habitual residence in the State of the forum. One of them stressed in this connection that the State of the forum had a clear interest in protecting its

habitual residents in the same manner as its citizens. He remarked that that was a widely accepted concept in various fields of international law, so that the assimilation of habitual residents to citizens had been conceded in fields other than that of jurisdictional immunity.

223. Other comments included the remark that paragraphs 1 and 2 could be combined in order to convey beyond doubt the scope of the non-immunity principle with respect to contracts of employment.

Article 13. Personal injuries and damage to property

224. A few representatives expressed serious reservations on article 13, basically for the reason that exceptions to State immunity should be reduced to a minimum. One representative, after indicating that his delegation endorsed the observations contained in paragraph 185 of the report, stated that a much greater effort was needed to find a common denominator to reconcile the different views concerning the responsibility of the State to pay monetary compensation for personal injuries and damage to property caused on foreign territory. According to another representative, the provisions raised three problems. First, according to article 31 of the Vienna Convention on Diplomatic Relations, diplomatic representatives should enjoy immunities from judicial proceedings in torts in the receiving State; it was obviously illogical for the sending State of diplomatic representatives not to be entitled to enjoy those jurisdictional immunities itself. Secondly, the article had gone even further than the restrictive doctrine, for it made no distinction between sovereign acts and private law acts. Thirdly, the question of a wrongful act or omission attributable to a State was considered within the scope of the international responsibility of a State.

225. A number of other representatives agreed with the basic thrust of the article. Some among them felt that its scope should be limited to cases involving injury or damage resulting from traffic accidents and should only cover compensation, while others took the opposite stand. In support of the idea underlying the draft article, the point was made that it accorded with the practice of those States which had taken a public position on the issue of personal injuries and damage to property. Reference was made in this connection to the European Convention on State Immunity. Another argument was that without such an exception to jurisdictional immunities of States, an injured individual would be without recourse and that the article therefore met the requirements of justice. In this context, one representative remarked that as a matter of international human rights law, individuals must have some effective recourse and that if the article was deleted, then the draft would be incompatible with the laws of those States which had codified jurisdictional immunity, all of which contained such a provision, and would therefore be less likely to be widely accepted.

226. Among the supporters of the draft article, several felt that its meaning and scope should be clarified. Comments in this respect focused on the relationship between the article and, on the one hand, the law on State responsibility and, on the other, the rules of diplomatic law.

227. On the first point, several representatives supported the inclusion of a paragraph specifying that the provision did not affect any rules concerning State responsibility under international law. Another representative suggested that the consequences of the insertion of any provision on that question into the framework of the topic of State immunity should be carefully studied and harmonized with the rules on State responsibility. In this context, one representative said that he had difficulty understanding the concern expressed in paragraph 188 of the report that an unlawful act or omission of a State should be determined through international procedures and not by national courts. He stressed that as national courts frequently made determinations in accordance with international law, the idea that international law could be applied only by so-called international procedures was not only outmoded, but was flatly contradicted by the practice of many States.

228. As regards the relationship between the article and the rules of diplomatic law, some representatives felt that there was no contradiction between the proposed provision and the Vienna Convention on Diplomatic Relations. One of them disagreed with the view that it was incongruous for article 13 to provide for the liability of the State itself in cases where a diplomatic representative of the State, whose act had caused the injury, would be immune from liability. In his view, diplomatic immunity was quite distinct from State immunity. Another representative, however, expressed concern at the possible lack of consistency between article 13 and the Vienna Convention on Diplomatic Relations. After emphasizing that article 13 would not be acceptable if it gave States a narrower immunity than was conferred by article 31 of the Convention, he recalled that under the latter article, a diplomatic agent should enjoy immunity and freedom from civil and administrative jurisdiction of the receiving State except in three cases. He concluded that since the immunity of the relevant State could not be less than that of its agents, it could be argued that in so far as article 13 deprived that State of immunity in respect of such acts, it was inconsistent with article 31. One representative suggested that the problem be solved by including a clause providing that immunity would be respected if the State which was the author of the act or omission had acted in the discharge of diplomatic or consular functions.

229. Some representatives suggested that the article be clarified in several other respects. One of them proposed providing for an obligation to take out insurance policies guaranteeing compensation for injury to the person and damage to property, so as to allow victims to bring a case against the insurer rather than involving a State in a sometimes cumbersome procedure. The remark was also made that the phrase "if the act or omission which is alleged to be attributable to the State" did not make clear the need for a link between the person responsible for the act or omission and the defendant State. The concluding phrase "and if the author of the act or omission was present in that territory at the time of the act or omission" gave rise to divergent views, one representative favouring its deletion and the other insisting on its retention. Finally, one representative suggested the inclusion of a safeguard clause providing that immunity would be respected if the State which was the author of the act or omission had acted in accordance with an international agreement or treaty in force between itself and the State of the forum.

Article 14. Ownership, possession and use of property

230. With regard to paragraph 1, the view was expressed that subparagraphs (c) to (e) should be deleted, because those provisions were likely to be interpreted as permitting courts of a State to exercise jurisdiction over a foreign State even in the absence of a link between the property and the foreign State. Another view was, however, that these subparagraphs could not simply be deleted, inasmuch as in none of the envisaged cases could the fact that one claimant was a State be allowed to prevent the local courts from deciding on the disputed claims. Furthermore, it was remarked, the subparagraphs contained legal concepts existing in the common-law countries that could not be deemed to be included in subparagraphs (a) and (b).

231. One representative considered that the main provision of article 14 must be subordinated to an express reservation respecting the immunity of property protected under diplomatic or consular immunity, in accordance with international law. He added that the use or purpose of all property must be established in the same way as was specified in the case of ships, in article 18, paragraph 7, by means of a certificate signed by a competent authority of the State concerned.

232. Other comments included the remark that the concept of property situated in the forum State should be introduced in subparagraph (b) and the suggestion that paragraph 2 be deleted.

Article 15. Patents, trade marks and intellectual or industrial property

233. Some representatives favoured deleting the article, or at least restricting its scope, on the ground, inter alia, that patents, trade marks and intellectual or industrial property were regulated by specific conventions, such as those of the World Intellectual Property Organization. The article was however supported by other representatives, two of them subject to the elimination of the reference to plant breeder's rights and rights in computer-generated works. The remark was made that those rights were innovations which could not be equated with well-recognized rights in regard to patents, trade marks, etc., and that it would be preferable to make use of formulations which would cover the various possibilities. One representative, on the other hand, felt that the article should be extended to cover new categories of intellectual property rights, such as rights in computer programmes.

Article 16. Fiscal matters

234. One representative observed that it would be inappropriate for the article to permit a State to institute a proceeding before a court in its territory against another State, since fiscal matters fell under the category of public law and proceedings relating to taxation were normally instituted by competent authorities of the foreign State. Another representative considered the article to be unnecessary. Still another suggested its deletion, having regard to the criterion that exceptions to State immunity must be reduced to the indispensable and relevant minimum. It was suggested that consideration be given to the insertion in the

current text of an exception in respect of matters regulated by international law relating to diplomatic and consular privileges and immunities.

Article 17. Participation in companies or in other collective bodies

235. One representative stated that, although there had been widespread support for the article, it would be preferable to delete the expression "or is controlled from" in paragraph 1 (b), inasmuch as a clearer criterion was provided by the other two references in the subparagraph, which were sufficient.

Article 18. State-owned or State-operated ships engaged in commercial service

236. Commenting in general on the article, some representatives expressed support for the current text. One representative favoured extending the concept of segregated State property to ships owned by companies and shipping lines and used for commercial service. He observed that the inclusion in the draft article of the concept of segregated State property would be of considerable value in promoting close economic relations in the interests of all countries.

237. As regards the criteria to be met by ships that would fall under article 18, one representative, after stressing that the text being prepared should be legally compatible with the various instruments on which it was based, pointed out that a clear rule emerged from the Geneva Convention on the international regime of maritime ports, the Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels and the United Nations Convention on the Law of the Sea: in order to enjoy immunity, a ship must be State-owned or State-operated and at the same time be in use for non-commercial governmental purposes. His delegation considered that the current text of article 18 departed from the definition derived from those rules of maritime law in two respects, as it: (a) would allow immunity from jurisdiction for a State-owned ship in use for a non-commercial private purpose; and (b) would allow for abandonment of the criterion of actual use of the ship as a means for determining its status, inasmuch as the words "intended exclusively for use" would allow a ship to enjoy such immunity on the basis not of its actual but merely of its potential use. He therefore renewed his delegation's request that the Commission refer to the definition appearing in article 96 of the Law of the Sea Convention.

238. With respect to the Special Rapporteur's recommendation to delete the word "non-governmental" in article 18, paragraphs 1 and 4, views were divided. Some representatives supported it, one with the proviso that the commentary would explain that a ship engaged in a governmental mission would enjoy immunity, and the other on condition that it be made clear that, in cases where the public interest was involved in a commercial activity carried out by a State ship the State concerned could invoke the immunity of the ship. Other representatives felt that the word "non-governmental" should be retained.

239. As regards paragraph 3 (a), one representative suggested that after the words "a claim in respect of collision or other accidents of navigation" the following phrase based on article 211, paragraph 1, of the United Nations Convention on the Law of the Sea should be added: "Inclusive of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States".

Article 19. Effects of an arbitration agreement

240. As regards the scope of the basic assumption reflected in the article, one representative said that it could be presumed that a State's consent to arbitration implied its consent to the exercise of supervisory jurisdiction over the implementation of the arbitral agreement by a court of the arbitral forum State. Some representatives, however, felt that the current wording was too vague. Some suggested that a provision should be included stating that submission to arbitration should not be construed as submission to the jurisdiction of the forum State so as to avoid confusing the arbitration agreement with the matter of immunity. One representative called for further clarification regarding the court before which a State party to an arbitration agreement lost its right to invoke immunity. After pointing out that, in practice, arbitration agreements determined the competent court or were sufficiently clear to avoid any uncertainty as to the nationality or location of the court, he suggested that article 19 should permit the State party to an arbitration agreement to retain the right to invoke immunity from jurisdiction before a court of a State which was not involved or was not designated by the agreement unless the agreement otherwise provided.

241. As regards the bracketed alternatives, "[commercial contract] [civil or commercial matters]", some representatives expressed preference for the phrase "commercial contract". One of them said that exception to immunity should be confined to arbitration arising out of commercial contract disputes rather than extended to cover civil and commercial contracts. Other representatives took the opposite stand. One of them said that the scope of arbitration could be extended to a civil matter, first, because there had already been precedents in that area and, secondly, because the scope of arbitration depended primarily on the terms of the arbitration agreement. She added that a provision should be included stating that submission to arbitration should not be construed as submission to the jurisdiction of the forum State.

242. With respect to the concluding phrase of the introductory paragraph, some representatives expressed preference for the current wording, which was described as clear and less complex than the alternative formulation of the Special Rapporteur. Others favoured the said alternative formulation, which had been borrowed from the European Convention on State Immunity.

243. As to the proposed new subparagraph (d), it was for the most part viewed as unnecessary and undesirable, inasmuch as it could be deemed to constitute a first step towards execution of the award, notwithstanding the requirement of the State's express consent. One representative, however, after recalling that his Government had proposed the addition of the words "recognition and enforcement" at the end of subparagraph (c), endorsed the Special Rapporteur's suggestion for the inclusion of

a new subparagraph (d) confined to "recognition of the award", on the understanding that recognition should be interpreted as the act which entailed "turning the award into a judgement or a title equivalent to a judgement by providing it with an exequatur or some similar judicial certificate".

Article 20. Cases of nationalization

244. There was virtual unanimity among the representatives who commented on article 20 that, as suggested by the Special Rapporteur, it should be deleted. Most of them pointed out that measures of nationalization, as sovereign acts, were not subject to the jurisdiction of another State and could not be considered to represent an exception to the principle of State immunity.

PART IV. STATE IMMUNITIES IN RESPECT OF PROPERTY FROM MEASURES OF CONSTRAINT

Article 21. State immunity from measures of constraint

Article 22. Consent to measures of constraint

Article 23. Specific categories of property

245. The debate confirmed that, in the words of one representative, there was still a division of opinion on the question of State immunities in respect of property from measures of constraint.

246. One view was that it would be preferable not to take up the question of measures of constraint for the time being. It was remarked in this connection that the scope of immunity from execution differed from that of immunity from jurisdiction. Attention was drawn to paragraph 217 of the Commission's report in which the Special Rapporteur himself had pointed out that, owing to the independent development of the issue of immunity from measures of constraint and that of immunity from jurisdiction, there was still a division of opinion on the first-mentioned subject. Concern was expressed that the Commission might be unable to propose widely acceptable solutions unless it changed its view, and it was suggested as a possible solution to make Part IV of the draft articles optional.

247. Another view was that the relevant draft articles must come closer to a broad and non-restrictive concept of immunity from execution or from measures of constraint on the property of a State and clearly set forth the principle of non-execution on the property of a foreign State in the territory of the forum State. Disagreement was expressed with the statement, to be found in paragraph 218 of the Commission's report, that "limited execution ... would have a better chance of obtaining general approval", and attention was drawn to the concern reflected in paragraph 221 that the recent tendency to restrict State immunity from execution was a dangerous departure from the rules of the sovereign immunity of States and should be curbed by the Commission.

248. Still another view was that the immunity of States from measures of constraint could no longer be absolute, as evidenced by the recent tendency in State practice. One representative felt that an in-depth consideration of the issue would enable the Commission to achieve a proper balance of the various criteria to be taken into consideration. Another indicated that his country was now in favour of the new tendency among developed countries to restrict State immunity from measures of constraint in respect of some categories of State property. Still another representative suggested a formulation of the relevant articles which set out clearly the principle of immunity from measures of constraint, followed by limited exceptions.

249. The same divergence of views manifested itself as regards the various alternatives before the Commission for articles 21, 22 and 23. Some expressed preference for the texts as provisionally adopted on first reading. They felt that the changes proposed by the Special Rapporteur would tilt the balance in favour of the "limited" immunity principle, thereby upsetting the compromise achieved by the Commission. They urged that greater caution should be exercised in restricting State immunity. Other representatives supported the second alternative submitted by the Special Rapporteur.

250. A few representatives offered specific comments on draft articles 21, 22 and 23 as adopted by the Commission on first reading. As regards article 21, one representative expressed support for the provision in subparagraph (a). Some representatives favoured the deletion of the phrase "[or property in which it has a legally protected interest]" in the preambular paragraph of the article and in paragraph 1 of article 22. Explaining her position on this point, one representative stressed that it was necessary to focus on property of a foreign State as the sole object deserving protection. She indicated that she could not endorse the idea of granting to third parties protection from measures of constraint simply because a foreign State had an interest in the property concerned and drew attention in that connection to the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, in which the concept of "interest" had been distinguished from that of "property".

251. Most representatives, however, focused their comments on the second alternative proposed by the Special Rapporteur for articles 21, 22 and 23. A number of them expressed support for the merger of articles 21 and 22 as provisionally adopted on first reading. One representative, however, viewed the new draft article 21 resulting from the merger as representing a radical departure from the text of original article 21, which set forth clearly the principle of inadmissibility of measures of constraint. He doubted whether a compromise solution could be found in the absence of clear recognition of the principle itself.

252. Specific comments on new draft article 21 concentrated on the bracketed phrase, "[and has a connection with the object of the claim, or with the instrumentality against which the proceeding was directed]", to be found in paragraph 1 (c). A number of representatives favoured its retention. It was remarked in this connection that if those words were deleted, measures of constraint could be taken against any property of a foreign State which was used for commercial purposes. Other representatives advocated the deletion of the

phrase in question. Some representatives furthermore welcomed the disappearance of the phrase "a property in which it has a legally protected interest", for the reasons indicated in paragraph 250 above.

253. As regards paragraph 2 of new draft article 21, support was expressed for the idea that the property covered by paragraph 1 could not be subjected to any measures of constraint.

254. New draft article 22 was viewed as being of fundamental importance. Comments focused on paragraph 1 (c). One representative, after pointing out that this provision recognized the fact that central banks were instruments of sovereign power, stressed that the activities of such banks should consequently enjoy immunity from measures of constraint and should have the legal status of a State organ automatically enjoying immunity. The phrase "and used for monetary purposes" at the end of the subparagraph was supported by one representative but objected to by others on the ground that a property of the central bank of a foreign State in the territory of the forum State should in all circumstances be excepted from measures of constraint, regardless of the purpose for which it was used.

255. New draft article 23 was viewed as unnecessary by some representatives, one of whom suggested that the Commission await the final results of its work concerning the definition of "State" in article 2 and the ultimate fate of article 11 bis before deciding on its possible deletion. Other representatives supported the proposed text. One of them viewed it as expedient in that, if a State could invoke immunity in contentious proceedings where an autonomous State entity which pursued commercial purposes was liable, forced execution on the State's property must be possible where the State placed such property at the disposal of the autonomous State entity for commercial purposes. The remark was also made in support of the draft article that no question arose as to the execution against general State property of judgements obtained against a separate State enterprise with its own legal personality and that, accordingly, draft article 23, which dealt with segregated State property, should be retained.

256. As for the title of Part IV, suppport was expressed for the suggestion to alter it to read "Jurisdictional immunities of States in respect of their property", a wording which, it was said, was sufficiently broad to include measures of constraint and execution.

PART V. MISCELLANEOUS PROVISIONS

257. One representative, referring to Part V in general, wondered if all its provisions actually related to the general theme of the jurisdictional immunity of States.

Article 24. Service of process

258. In addition to comments specifically addressed to paragraphs 1 and 3, draft article 24 elicited two general remarks. One representative stated that the draft article moved directly from a definition of the principles applicable with respect

to State immunity to a detailed description of the procedure to be followed in bringing an action against a foreign State. In his view, the deletion of the article would have no prejudicial implications, whereas its retention would give rise to possibly difficult technical discussions. Another general observation was that the draft article placed too much emphasis on the Ministry of Foreign Affairs and attached to that Ministry an importance not warranted in judicial and litigation matters as distinct from matters relating to international affairs.

259. As regards paragraph 1, several representatives called for more flexibility. One of them remarked that each State had its own rules as to the service of process, to which the courts attached the greatest importance, and that it could not be assumed that States would be willing to modify their domestic rules of civil procedure in order to make them conform with the future instrument. He therefore suggested that a new subparagraph (a) to paragraph 1 be added, reading "in accordance with the rules of civil procedure of the State of forum", and that former subparagraphs (a) and (b) be renumbered as (b) and (c). The incorporation of that clause, he further remarked, would facilitate acceptance of paragraph 4. Another representative indicated that he remained opposed to the hierarchy of the various forms of service of process. In the opinion of his delegation, the competent courts should be free to choose the most suitable procedure for each particular case.

260. The new wordings proposed by the Special Rapporteur for subparagraphs (a) and (b) were supported by two representatives. As for subparagraph (d), one representative reiterated his doubts regarding the transmission of documents by mail to the head of the Ministry of Foreign Affairs, since, in the case of transmission through diplomatic channels, it would be sufficient to address the relevant documents to the Ministry.

261. Concerning paragraph 3, the deletion of the words "if necessary" was favoured by two representatives, one of whom also supported the Special Rapporteur's proposal to add the words "or at least by a translation into one of the official languages of the United Nations".

Article 25. Default judgement

262. Although one representative saw merit in deleting article 25, others sought to improve its formulation. Some among them expressed interest in, or support for, the suggestion to include a requirement that a court should not issue a default judgement without considering ex officio whether the foreign State was immune. One representative, after pointing out that there had been cases where default judgements had been issued in circumstances where it seemed reasonably clear that the defendant State could have relied on immunity, suggested that the above-mentioned requirement should be subject to three limitations: first, the provision should extend only to the issue of immunity; secondly, the court should not be required to go beyond the facts as they appeared on the papers before it; and thirdly, that principle should apply to the question of whether it appeared that the defendant was a foreign State as defined.

263. *Other comments included* the remark that the words "if necessary" could be deleted from paragraph 2 and the observation, made by several representatives, that the Special Rapporteur's proposal to add at the end of paragraph 1 a phrase reading "and if the courts had jurisdiction in accordance with the present articles" was worthy of support.

Article 26. Immunity from measures of coercion

264. While the article did not give rise to substantive objections, two representatives felt that its formulation could be improved. One of them observed that it was not clear from the current wording whether the immunity was from the making of a court order requiring a State to perform or refrain from performing a specific act, or merely from suffering a monetary penalty for violating such an order. Another representative suggested the following text:

> "Where a State enjoys immunity in a proceeding before a court of another State, the court cannot issue any order against the State requiring it to perform or refrain from performing a specific act."

Article 27. Procedural immunities

265. One representative felt that the deletion of article 27 would have no prejudicial implications, whereas its retention would give rise to possible difficult technical discussions. In the view of another representative, the provisions of the article did not clearly stipulate the obligation of the foreign State to assume the judicial costs which would be the necessary corollary of the exemption from the requirement to provide any security, bond or deposit.

Article 28. Non-discrimination

266. Some representatives suggested that the article be deleted. One of them pointed out that a number of articles in the draft left open the possibility for States parties to the future instrument to extend to each other, by means of an agreement or on the basis of the principle of reciprocity, treatment which was more or less favourable than that provided by the instrument. Another, after pointing out that article 28 had been modelled on article 47 of the 1961 Vienna Convention on Diplomatic Relations and on article 72 of the 1963 Vienna Convention on Consular Relations, stressed that the rule of non-discrimination, although logical in the case of diplomatic or consular agents, made little sense in the case of States.

D. THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

1. General comments

267. Several representatives stressed the importance of the topic. It was pointed out that the demand on freshwater supplies was increasing while the water supply itself tended to diminish, and that the international community should therefore take measures immediately to ensure water supplies for future generations. Reference was made in particular to the situation of many developing countries where drought and desertification were a constant threat and where rational management of water resources and preservation of water quality were vital for a growing population.

268. Attention was also drawn to the links between the topic and international environmental law which was described as one of the central issues of the time. In this connection, one representative stressed that the protection and preservation of the environment formed one of the topic's key aspects, being of vital importance not only to each individual State but to mankind as a whole. He added that his Government was convinced that the problem of the environment could be resolved only by joint efforts on the part of all States, and wished to intensify its cooperation in that field with other countries, inter alia, within the framework of international organizations.

269. Emphasis was furthermore placed on the implications of the topic as regards good-neighbourly relations between watercourse States. In this context one representative, after stressing the need to guarantee that neighbouring countries had access to international watercourses on an equitable basis, described his country's positive experience gained from the establishment of commissions with neighbouring States.

270. As regards the general approach to the topic, satisfaction was expressed at the unanimous acceptance by the Commission of the principle of equitable regulation of international watercourses, excluding any form of unilateral regulation and stipulating consultation and cooperation between watercourse States. Several representatives insisted on the need to ensure an equitable balance between the rights of downstream and upstream riparian States. One of them stated that, in view of the principle of the territorial sovereignty of States, the watercourse State of origin must enjoy priority use of the waters in question, provided that it did its best not to injure downstream States. It followed, he went on to say, that the obligation to notify other watercourse States of measures with possible adverse effects applied only in cases where human activities were directly responsible for the potential effects and that in other cases, notification should take place as soon as practicable.

271. A few representatives commented on the term "international watercourse". One of them reiterated his view that the draft articles should use the wider term "international watercourse system", so as to ensure the most comprehensive and effective protection possible. Other representatives took the opposite stand. One of them expressed concern that the term "international watercourse" should not be

defined too broadly and therefore favoured the deletion of the word "system". Another representative similarly expressed preference for the concept of "watercourse", rather than that of "watercourse system", which, in his opinion, was too vague and had territorial connotations, since it encompassed various hydrographic components (rivers, lakes, canals, glaciers and groundwater).

272. As regards the aim of the work on the topic, support was voiced for the formulation of a legally binding instrument even if it were made up of general and residual rules, and the view was expressed that the mandate of the Commission should be clarified, if necessary, in order to remove any doubt as to what was expected of it. The desirability of couching the results of the Commission's work in the form of binding rules in a convention was on the other hand questioned, and the suggestion was made that it would be more appropriate and more likely to meet with general acceptance if the rules were embodied in a set of recommendations or guidelines.

273. The "framework agreement" approach adopted by the Commission was endorsed by a number of representatives who viewed it as, in the words of one of them, the only way to conclude agreements which were compatible with specific needs and circumstances. But although one representative expressed satisfaction at the reassurance, found in paragraph 257 of the Commission's report, that there was general agreement on the meaning of the term "framework agreement", attention was drawn to the fact that different opinions continued to be expressed in this connection. For instance, one representative said that a framework agreement should contain the fundamental legal principles accepted by the entire international community and providing a basis for the conclusion of bilateral, regional and subregional watercourse agreements. Another described a framework instrument as one furnishing States with guidelines for the conclusion of specific agreements on specific watercourses. The instrument, he went on to say, should not go into detail, particularly with regard to procedure, nor should it establish general binding obligations which might affect existing agreements or unduly restrict the discretion of riparian States to conclude agreements. Still another representative felt that the term "framework agreement" denoted an instrument that contained general residual norms to serve as a source of inspiration for riparian States. The view that the general rules to be formulated would be mere residual rules gave rise to reservations on the part of one representative who observed that, to the extent that they were deduced from the numerous treaties on navigation, pollution and power production, the rules in question would reflect customary law. The view that only general rules should be formulated was also called into question. One representative remarked in this connection that it was extremely difficult not to enter into details and the Commission should not insist on refraining from going beyond the limits of a framework instrument.

274. The representatives favouring the framework agreement approach felt that, despite the Commission's stated intentions, the draft articles did not always reflect that approach and should be amended on second reading with a view to devoting a large number of articles to general principles and basic rules. One of them said in this connection that the Commission had perhaps aimed too high and had devoted too much time to the drafting of very detailed regulations, thereby compromising the original concept of a framework agreement. While agreeing that

the examination of specific details would be useful, inasmuch as it would remind States of the points to be taken into consideration in the conclusion of specific agreements, he urged the Commission not to go too far beyond the existing State practice.

275. Concern over departures from the framework agreement approach was specifically expressed in relation to the draft articles provisionally adopted by the Commission at its forty-second session. Reference is made in this connection to paragraphs 281 to 283 below.

2. Comments on the work carried out by the Commission at its forty-second session

276. A number of representatives welcomed the substantial progress achieved by the Commission at its forty-second session and noted with satisfaction that every effort would be made to complete the first reading of the articles at the forty-third session. Gratification was expressed at the fact that, with the submission of the second part of his fifth report and that of his sixth report, the Special Rapporteur had now covered most of the relevant ground. The discussions to which those documents had given rise in the Commission were described as useful.

(a) Comments on articles 22 to 27 as provisionally adopted by the Commission

(i) General comments

277. Articles 22 to 27 as provisionally adopted by the Commission generally met with approval. One representative said that those articles had been largely based on the United Nations Convention on the Law of the Sea and other relevant instruments and seemed on the whole satisfactory. Another representative viewed Parts IV and V of the draft as an important contribution to the consolidation of general principles of international environmental law. He added that those articles which had been based on Part XII of the Law of the Sea Convention showed that there was a trend towards regarding their content as an integral part of customary law on protection of the environment. Still another representative observed that the Commission had drafted language which made it sufficiently clear when riparian States of international watercourses must take action to prevent or reduce any harmful effect of certain conditions or human conduct on other watercourse States or their environment. He added that the proposed articles were closely related to other rules of international law serving the same purpose and that those close links with existing conventions would be conducive to establishing the most comprehensive system possible of complementary global and regional regimes of international watercourses.

278. While generally endorsing articles 22 to 25, some representatives struck a note of caution in this respect. Some observed that those provisions contained broad principles or statements of environmental policy rather than detailed rules, and that their implementation would be determined on the basis of local circumstances. In their opinion, the sort of cooperation established in regard to planned measures (Part III of the draft), which consisted in the duties to notify

and consult, should be fully applicable to ensure adequate environmental protection, and it might be necessary to spell that out more clearly in the draft. Another remark was that, to comply with their obligations in respect of the protection and preservation of ecosystems and the marine environment, developing countries, despite their goodwill, sometimes required appropriate assistance.

279. Several representatives, on the other hand, expressed doubts or reservations on articles 22 to 27. Comments focused on the necessity for those articles, on their compatibility with the framework agreement approach and on the extent to which they established a proper balance between watercourse States depending on their geographical situation with respect to the watercourse.

280. As regards the first point, one representative said that articles 24 to 28 were unnecessary, since their content was already covered by articles 6, 8, 9 and 10. Another representative, although not opposed to the adoption of articles 22 to 25, said that those articles were dispensable since all the obligations set out in them were contained by implication in previous articles.

281. As for the compatibility of articles 22 to 27 with the framework agreement approach, one representative observed that two issues arose in that connection, one relating to policy and the other relating to law.

282. On the policy aspect, one representative said that articles 24 to 28 imposed unacceptable international obligations without much basis in international law and therefore required careful re-examination and reformulation. Another representative, while recognizing that it was possible to argue that the formulation of detailed provisions seeking to apply the general principles in the agreement was best left for the watercourse agreements contemplated in article 4 for adoption by watercourse States, felt that there was justification for the inclusion of such provisions, subject to their clarification and amendment.

283. On the legal aspect, some representatives said that they would welcome a more detailed explanation of the way in which the provisions in Part IV were intended to relate to the fundamental obligations contained in articles 6, 8, 9 and 10. To illustrate this point, one representative referred to articles 22 and 23. He observed that the obligation under article 22 for watercourse States individually or jointly to protect and preserve the ecosystems of an international watercourse was stated in the commentary to be a specific application of (a) the requirement in article 6 that watercourse States were to use and develop an international watercourse system in a manner consistent with its adequate protection, (b) the obligation under article 6 for watercourse States to participate in the protection of an international watercourse in an equitable manner, which included the duty to cooperate in its protection and development and (c) the obligation under article 9 for watercourse States to cooperate in order to attain adequate protection of an international watercourse. In his view, the question arose whether those obligations under article 6 and 9 could be introduced into the regime of article 22 without any language to indicate the relationship between the two sets of articles and whether it could be argued that a watercourse State was in breach of its obligation under article 22 because it had failed to participate in the protection of the watercourse in an equitable manner. Thus, he concluded, it might be

necessary to specify the interconnection between the two sets of articles by inserting in article 22 language such as "without prejudice to articles 6, 8, 9 and 10" to indicate the applicability to article 22 of the general principles set forth in those articles. To further illustrate his point, he referred to article 23, paragraph 2, which provided that watercourse States should, inter alia, harmonize their policies in the prevention, reduction and control of pollution of an international watercourse. After noting that the commentary stated in paragraph (7) that the provision was a specific application of certain of the general obligations contained in articles 6 and 9, particularly the obligation under article 9 to cooperate in order to attain adequate protection of an international watercourse, he pointed out that cooperation under article 9 was based on sovereign equality, territorial integrity and mutual benefit and raised the question whether a watercourse State could argue that it was relieved of the obligation under article 23, paragraph 2, to harmonize its policies on reducing pollution with other watercourse States on the ground that the principles of sovereign equality and mutual benefit had been breached. He added that if the commentary was a proper interpretation of article 23 and many of the other articles dealt with in the report, some way would have to be found to link the obligations under the general principles of articles 6, 8, 9 and 10 with those articles which were intended to reflect a specific application of those principles.

284. As regards the extent to which the articles established a proper balance between watercourse States depending on their geographical situation with respect to the watercourse, one representative said that it was sometimes difficult to reach a position on specific provisions because they did not make a distinction between contiguous and continuous international watercourses. For instance, in cases of joint institutional management, the situation regarding contiguous and non-contiguous riparian States was not the same. Another representative detected what he termed an unreasonable shift in the approach to the subject, which had caused the Commission to stray from the criteria initially adopted. After stating that the initial, correct approach, reflected in articles 2 and 6, had been based on the search for a solution which took into account the legitimate interests of both upstream and downstream States, as well as the environment of all States affected by international watercourses, he noted that that broad approach appeared to have given way, in the draft articles provisionally adopted by the Commission at its forty-second session, to a much narrower view which was concerned only with harm to watercourses and the neighbouring environment and did not take into account the water and energy requirements of watercourse States as a whole, with the result that the draft protected the interests only of downstream States while attributing liability solely to upstream States. The same representative feared that if the drafting process continued to be governed by that approach the resulting text would deal solely with the uses of international watercourses by upstream States and their attendant obligations, a dangerous approach which could be seen in article 23, paragraph 2, and even more clearly in article 26, which in fact sought to protect only downstream States, totally disregarding the latter's need for water in order to prevent or mitigate drought or desertification in their own territory. He urged the Special Rapporteur and the Commission to restore the necessary balance between the rights and interests of upstream and downstream States on the basis of justice and equity.

285. Disagreement was on the other hand expressed with the view that the draft articles benefited downstream more than upstream countries. The concept of "appreciable harm", it was stated, clearly proved the contrary.

(ii) Comments on specific articles

Article 22. Protection and preservation of ecosystems

286. Comments focused on the scope of the obligation enunciated in the article and on the term "ecosystem".

287. On the first point, the remark was made that environmental protection should not be regarded as a goal in itself which prevented all human activity. One representative observed in this connection that the obligation imposed on States under article 22 was not self-contained but should be viewed within the context of article 6, namely, the framework of equitable and reasonable utilization and participation - which was tantamount to saying that the article did not guarantee absolute protection since the requirements of interdependence and good-neighbourliness necessitated a certain tolerance of pollution. He pointed out that article 23, which set the threshold for observing the obligation to prevent, reduce and control pollution at the level of appreciable harm, seemed to confirm that interpretation of article 22, adding that since certain watercourses were already polluted, States were expected to do what they could to reduce pollution to mutually acceptable levels - an approach reflected in the two 1976 Conventions on protection of the Rhine from chemical pollution and from chloride pollution, respectively.

288. The view was on the other hand expressed that the strict obligation imposed on watercourse States to protect and preserve the ecosystems of international watercourses paralleled the equally strict obligation imposed on States by article 192 of the United Nations Convention on the Law of the Sea to protect and preserve the marine environment, even though the term "ecosystem" was narrower in scope than the term "marine environment".

289. As for the term "ecosystem", its use was supported by some representatives but gave rise to reservations on the part of others. It was said in particular that, although the concept might have a quite specific scientific meaning, it was too broad, and encompassed spatial units which went considerably beyond the concept of "watercourse". The remark was also made that, despite the commentary to article 22, the precise difference between the concept of "environment" and that of "ecosystem" was not always clear, particularly as the definitions given in footnote 144 referred to the "non-living environment" and to the "environment".

Article 23. Prevention, reduction and control of pollution

290. As regards paragraph 1, attention was drawn to what was termed the extreme simplification of the definition of pollution in comparison with the existing definitions in many treaties. Another observation was that pollution could also

take the form of long-range air pollution, which should of course be prevented at the source. That problem, it was remarked, was not covered by the draft article as currently worded.

291. With respect to paragraph 2, comments focused on the relationship between the obligation enunciated therein and obligations set forth in other international instruments or other articles of the draft. In this connection, one representative observed that while it was true that, as stated in paragraph (4) of the commentary, the expression "prevent, reduce and control pollution" was also to be found in article 194, paragraph 1, of the United Nations Convention on the Law of the Sea, the obligation imposed by the latter instrument was less strict than that proposed under article 23 and hardly differed from that imposed on watercourse States under article 24 of the present draft, in respect of which paragraph (3) of the commentary stated that it was one of due diligence and would not be regarded as having been breached if a watercourse State had done all that could reasonably be expected to prevent the introduction of the species referred to in the article. Thus, he went on to say, both the obligation under article 194, paragraph 1, of the United Nations Convention on the Law of the Sea and that under article 24 of the draft under consideration were obligations of due diligence, and the question then arose as to why the obligation under article 23, paragraph 2, had not also been couched in the language of due diligence and whether the intention had been to impose a strict obligation on the watercourse States in the matter.

292. Also in relation to paragraph 2, one representative said that the requisite balance had not yet been achieved between the rights of upstream and downstream countries. He added that, in addition to the prevention, reduction and control of pollution, the paragraph should make provision, if only under certain conditions, for the elimination of pollution.

293. Other comments on paragraph 2 included, first, the remark, also applicable to article 24, that the term "appreciable harm" was ambiguous and subjective and should be replaced by "considerable harm" or "substantial harm" and, secondly, the observation that the concept of the environment in article 23 was broader than the concept of the ecosystem in article 22, so that using both concepts, in spite of their similarity, gave rise to difficulties in interpretation.

294. As for paragraph 3, one representative noted that it required States to cooperate in identifying harmful substances and underscored the concept of preventive measures to protect watercourses. In this connection, another representative expressed the view that the solution of drawing up a list of substances would prompt scepticism in anyone familiar with the experience of States which had tried to establish such lists and that a better approach might be to identify harmful substances by defining their main characteristics.

Article 24. Introduction of alien or new species

295. The article was described as a forward-looking provision. One representative, while supporting it, stressed that benefits as well as harm could result from the introduction of alien species and that the advantages and disadvantages should

therefore be weighed against each other for each situation and for each watercourse. That, in his view, could be achieved if the riparian States concerned held consultations before an alien species was introduced.

Article 25. Protection and preservation of the marine environment

296. Some representatives supported the article as an important addition to global and regional efforts to protect the environment and as reflecting awareness that rivers must not be cleaned up at the expense of the marine environment. One of them pointed out that the inclusion of the article did not mean that all States could intervene in activities aimed at protecting the environment, since watercourse States did not have a responsibility erga omnes but only to the other watercourse States or riparian States directly affected.

297. Other representatives, however, expressed reservations with regard to the article. One of them considered it doubtful that the protection of the marine environment, which was dealt with in other instruments, fell within the scope of the draft articles.

298. Two representatives commented on the relationship between article 25 and the corresponding provisions in the United Nations Convention on the Law of the Sea. One of them remarked that the expression "take all measures ... necessary" had the same meaning as in article 24 and connoted an obligation of due diligence. He asked whether an obligation of due diligence imposed on watercourse States to protect the marine environment was consistent with the strict obligation imposed by article 192 of the Law of the Sea Convention on States to protect and preserve the marine environment. In his view, the question arose as to whether it was correct to reduce what was a strict obligation in that instrument to one of due diligence in the present draft articles.

299. Another representative, after noting that the Special Rapporteur frequently referred, in the context of the protection of the marine environment, to a related provision in the United Nations Convention on the Law of the Sea, pointed out that that Convention generally referred to the protection of the international marine environment and not to that of areas under national jurisdiction, and that since the Commission was concerned solely with areas under national jurisdiction it was inappropriate for it to borrow from the Convention the phrase "individually or jointly" in the context of the protective measures to be taken, particularly since the Convention on the Law of the Sea immediately qualified the phrase with the words "as appropriate", and its article 193 recognized the sovereign right of States "to exploit their natural resources pursuant to their environmental policies". In his view, the use of the word "jointly" in the draft instrument under consideration appeared to place upstream States at a disadvantage. He therefore urged that the phrase be deleted, or at least that it be tempered, where used in the draft articles that had been adopted provisionally, particularly articles 25 and 26.

Article 26. Prevention and mitigation of harmful conditions

Article 27. Emergency situations

300. Some representatives made comments applicable to both articles. Thus it was noted that as a result of changes made in the text of the draft articles as originally proposed by the Special Rapporteur, the distinction between "normal" hazards and "emergency" situations had now been clarified. In this context the remark was made that, whereas "emergency situations" occurred suddenly and caused, or posed an imminent threat of causing, serious harm to other States, "harmful conditions" (article 26), although not arising as abruptly, could also be harmful to other States.

301. Also referring to both articles, one representative noted that neither expressly linked the situations or conditions in question to watercourses. While recognizing that such a link could be inferred from the examples of causes given in the two articles and that, moreover, there would be no justification for including in a set of articles on watercourses provisions on phenomena not linked to watercourses, he called for more precision in the drafting.

302. A further comment relating to both articles was that the Commission should take into account such recent developments in international law as the convention on oil pollution preparedness and response that would soon be concluded under the auspices of the International Maritime Organization (IMO) and the convention on hazardous installations which was being negotiated within the framework of the Economic Commission for Europe (ECE).

303. With specific reference to article 26, one representative noted that the obligation to take appropriate measures to prevent or mitigate harmful conditions was equivalent to an obligation to act with diligence and that the measures should be adapted to the case in question and take account of both the situation of the State concerned and the harmful situations themselves. Another representative remarked that, under the article, the responsibility of watercourse States included not only activities within their sphere of competence but also other sources of hazard.

304. One representative observed that, as currently drafted, the article could be interpreted as entailing a general and unlimited obligation of States to prevent natural disasters - an obligation which would go beyond the international duties of States - and should therefore be reworded. Other drafting comments included the suggestion that the terms "control and, if possible, eliminate" should be inserted after "mitigate".

305. As for article 27, it was described as a wide-ranging provision which also included non-contracting States and was more onerous than article 26 since it provided not only for an obligation to take all practicable measures necessitated by the circumstances but also for an obligation to inform potentially affected States and competent international organizations. One representative expressed the view that the article contained very detailed rules which seemed to be more concerned with creating equal economic conditions among States than with protecting the environment.

306. As regards paragraph 4, the remark was made that it envisaged the possibility of an obligation to develop joint plans for responding to emergencies, where appropriate; such an obligation, it was observed, depended on whether States agreed on the need to develop such plans, but the text of article 27 was not explicit on that question. Also referring to paragraph 4, one representative wondered whether it was realistic to require watercourse States to develop contingency plans for responding to emergencies in cooperation with other potentially affected States and competent international organizations. In his view, that would unduly increase the number of those called upon to participate in the application of alarm or information systems, and the obligation to reach agreement should only relate to States that were at risk because of an emergency.

(b) Comments on the draft articles proposed by the Special Rapporteur in his fifth report and in the first part of his sixth report

Article 24. Relationship between navigational and non-navigational uses; absence of priority among uses

307. A number of representatives expressed support for the inclusion in the draft of a provision along the lines of draft article 24 as proposed by the Special Rapporteur. One of them noted that such a provision was necessary because article 2, provisionally adopted by the Commission, had recognized the relationship between navigational and non-navigational uses of international watercourses.

308. Reservations were on the other hand expressed on the draft article. One representative remarked that the principle of absence of priority among uses was based on the outdated problem of the priority of navigational uses. In his opinion, some priorities should be established in favour of domestic and agricultural utilization. Another view was that since the basic purpose was to cover all non-navigational uses and to leave aside navigational uses, article 24 dealt with a matter which fell outside the scope of the draft, namely, the absence of priority among uses, and could be dealt with in other types of instruments.

309. The principle enunciated in paragraph 1, that no use should enjoy priority over other uses was supported by a number of representatives. It was viewed as geared towards the harmonization of the joint and individual interests of watercourse States, as a corollary of the principle of permanent sovereignty of States over their natural resources and as consistent with the idea that priority for navigation could no longer be defended in view of the development of technology, rapid population growth and the scarcity of water resources.

310. Some representatives, however, urged a cautious approach to the question. One of them said that the principle of absence of priority among uses of an international watercourse, as expressed in draft article 24, was an extremely sensitive issue which must be examined carefully in view of the consequences which its general application might have. He pointed out that since each watercourse, whether navigable or not, had its own characteristics, the draft articles should not lay down general rules, especially in the case of transboundary natural resources which, as such, were meant to satisfy human needs in watercourse States.

Some representatives also stressed that the concept of priorities should not be regarded as an abstract principle not involving specific factors and must instead be based on the existence of real elements, such as the benefits to be derived by populations that depended either directly or indirectly on the watercourse in question. The point was made that if priority was not assigned to various different types of uses it would not be possible for given groups of people who were usufructuaries to benefit from the watercourse and that there must therefore be a direct relationship between the concept of assigning priority and the concept of the benefit to be derived. A further remark was that there was a glaring contradiction between the principle of the absence of priority among uses of a watercourse and draft article 25, paragraph 1 (which provided for cooperation in identifying needs and opportunities for regulation of international watercourses), inasmuch as genuine cooperation required that watercourse States be free from the implicit obligation laid down in draft article 24.

311. Other comments relating to paragraph 1 focused on the phrase "in the absence of agreement to the contrary". While one representative supported it on the ground that it enabled users to decide how to derive maximum benefit from a given international watercourse, it being understood that any use must exclude damage to water quality, another representative indicated that the principle in paragraph 1 should be made into a conventional rule which could only be abrogated by a contrary conventional rule. The view was furthermore expressed that the parties to the "agreement to the contrary" should be specified.

312. The idea underlying paragraph 2 was supported by some representatives. One of them said that the paragraph was by far the most important provision of the draft article and should be elaborated on, following the model of articles VII and VIII of the Helsinki Rules of 1966. Among the relevant factors referred to in the paragraph, one representative singled out the need to secure or maintain a high level of water quality for the health of the population and domestic and agricultural uses, as well as the use of water with adverse effects on the environment. Another mentioned geography, climatic conditions, the economic and social needs of individual riparian States, the existence of alternative means, including the availability of other sources to satisfy needs and the possibility of compensation to one or more riparian States in the context of negotiations between them. A number of representatives felt that the text under consideration would be more comprehensive if it encompassed the obligation not to cause appreciable harm through the inclusion of a reference to article 8. It was also suggested that the paragraph be redrafted so as to indicate in a more straightforward manner that the relationship between different uses should be determined by the States concerned themselves.

313. The paragraph, however, also gave rise to reservations. One representative said that in addressing itself to conflict situations and venturing into the field of dispute settlement the provision went beyond the scope of the draft and beyond the Commission's competence. As regards the reference to articles 6 and 7, another representative recalled his delegation's reservations concerning the creation in the abstract of a legal obligation to cooperate. In his opinion, it was advisable to promote cooperation but only the States concerned could establish an obligation to cooperate.

314. Drafting observations included the remark that paragraphs 1 and 2 should be converted into two separate articles, and the suggestion that the title of the articles be limited to its first part. The suggestion was also made to substitute, in paragraph 1, the words "other use or category of uses" for the words "other use" and to replace, in paragraph 2, the notion of conflict by the notion of incompatibility of several uses.

Article 25. Regulation of international watercourses

Article 26. Joint institutional management

315. The question was asked whether two separate provisions on regulation of international watercourses and joint institutional management were really needed, inasmuch as regulation was just one aspect of management. Along the same lines, the remark was made that there appeared to be little difference between the provision stipulating that States should cooperate in identifying needs and opportunities for regulation and the provision stipulating that States should enter into consultations. The necessity for both articles was furthermore questioned in the light of other provisions of the draft articles, among which one representative singled out article 4, paragraph 3.

316. General comments on draft article 25 included the remark that such a provision could perhaps be dispensed with in the light of article 9, which contained the general obligation for riparian States to cooperate "in order to attain optimum utilization and adequate protection of an international watercourse [system]", and the remark that the Commission should undertake exhaustive discussions so as to clarify the content of the legal obligations and the modalities of participation of each State in those regulations and of the burden-sharing that accompanied regulation.

317. The view was furthermore expressed that the text should be made more precise. Thus, one representative stated that the Commission should clearly set forth the legal obligation of each State with regard to the regulation of international watercourses. Other representatives stressed that draft article 25 should take account of the negative impact that regulation of a watercourse could have on the territory of States situated downstream. One of them insisted on the need to reconcile the traditional concept of the use of international watercourses, based on the assumption that the principle of State sovereignty should prevail, with the current evolution in the rights and obligations of States in exercising their territorial competence. He stressed that the fundamental principle to bear in mind - namely, that all riparian States could undertake the construction of works on an international watercourse, provided that such construction did not cause appreciable harm outside their territory - was in keeping with the obligation of watercourse States not to cause appreciable harm, as indicated in article 8, and was a principle of customary law solemnly reaffirmed in principle 21 of the 1972 Stockholm Declaration on the Human Environment. Thus, he concluded, all States had the sovereign right to exploit their resources pursuant to their own environmental policies, provided that they ensured that activities within their jurisdiction did not cause serious harm to the environment of other States; it would be wrong to

conclude that that principle entitled a State to pronounce on the economic policy of another State and to obstruct its economic development plans.

318. As regards paragraph 1, comments focused on the nature and extent of the obligation enunciated therein and on the term "regulation".

319. On the first point, several representatives endorsed the Special Rapporteur's approach whereby regulation was not regarded as a general obligation for watercourse States but as an obligation of cooperation. On the concept of cooperation, one representative said that cooperation should be based on general principles of international law, such as sovereign equality, territorial integrity and mutual benefit, in accordance with the provision laid down in article 9. Another representative said that cooperation between watercourse States should be more than a moral obligation, should be undertaken at the bilateral or multilateral level and should exclude political differences.

320. Some representatives, however, felt that the obligation of cooperation should be expressed in more flexible terms. One of them observed in this connection that the notion of equity mentioned in paragraph 2, while unassailable from a theoretical point of view, was generally reflected in practice by a political compromise between the interests of the States concerned which was the outcome of diplomatic negotiations. Furthermore, States would have difficulty in accepting the obligation of cooperation in paragraph 1 without making it subject to the prior conclusion of an agreement on financing the regulation works referred to in paragraph 2. Another representative, while noting that paragraph 1 did not stipulate an obligation to cooperate with respect to the regulation of international watercourses but only in identifying needs and opportunities for regulating them, none the less felt that the provision should be formulated in less mandatory terms. It was also said that an instrument such as the one under discussion should take a flexible approach to the issue of cooperation so as to ensure that there were no constraints on initiatives concerning the construction and maintenance of works of concern to one State.

321. Still other representatives felt that the obligation for international watercourse States to cooperate when one of them so requested with a view to regulating international watercourses should be directly established and the purpose of such regulation specified. Another remark was that it should be assumed that watercourse States were obliged to cooperate in the regulation of watercourses and not only to cooperate "in identifying needs and opportunities for cooperation".

322. On the second of the points mentioned in paragraph 318 above, the view was expressed that it would be desirable to clarify what was meant by "regulation", either by specifying its precise object, for example, "regulation of the flow of water", or by providing a formal definition. Reference was made in this context of the definition adopted by the International Law Association in 1980.

323. As regards paragraph 2, one representative reiterated his view that the principle of equitable State participation could not be established as a general rule and suggested that the paragraph be formulated as a recommendation directed towards States in negotiating their individual agreements and not as an additional rule.

324. While one representative questioned the need for the paragraph on the ground that it was inconceivable that a watercourse agreement on regulation works would neglect the provision for a sharing of the burdens, another suggested that paragraph 2 might stipulate only the obligation for the watercourse States to reach an agreement on the construction and maintenance of works relating to the watercourse. Still another representative felt that the Commission should elaborate the paragraph by including some of the provisions governing the regulation of international watercourses adopted by the International Law Association in 1980.

325. Drafting comments on draft article 25 included the remark that in the title the term "regulation" did not reflect either the essence or the purpose of the article, the observation that in paragraph 1 the words "directly or through regional or international organizations" should be included after "co-operate" and the suggestion that paragraph 2 should refer not only to the construction and maintenance of regulation works but also to their improvement and modernization.

326. Draft article 26 was viewed by a number of representatives as a provision of vital importance to protect international watercourses and ensure that they were put to the best possible use. However, it also gave rise to serious reservations.

327. Several representatives pointed out that, although recent treaties had seen an extension of the role of joint commissions in the management of international watercourses, there was no obligation in general international law to establish joint management bodies or to consult with a view to establishing a joint body or organization, and that the stipulation of such an obligation would go beyond the limits of a framework agreement. In their opinion, the draft should not provide for the establishment of a permanent organization, and it should be left to the parties to future watercourse agreements to define the functions of any bodies set up under the agreements. It was also remarked that in some cases the establishment of joint commissions might be too cumbersome, particularly in respect of small boundary rivers, and that the institutional suggestions should therefore be sufficiently flexible. Among the delegations which accordingly recommended a cautious approach to the question, some suggested that article 26 be restricted to a mere recommendation which States would take into account according to the specific features of each watercourse. Others held the view that the obligation should be made subject to certain conditions in order to make the text more realistic and acceptable to a large number of States. Another suggestion was that the article should focus not on the creation of a joint organization but on joint management which could take on different forms and involve companies or enterprises of private law.

328. Other representatives approved the general thrust of the draft article. One of them congratulated the Special Rapporteur on his boldness in proposing such a provision, which was an example of the detailing, refining and particularization of the general obligation under article 9 to cooperate; he stressed that international watercourses were so vital to the survival of large sections of the world's population that their management on an agreed international basis was an irresistible imperative of modern life. Another representative remarked that, while there was no obligation under international law to set up joint management,

such a requirement would seem to be the logical conclusion for the most efficient fulfilment of the obligations provided for in articles 6, 8, 9 and 10 and in Part III. In the view of his delegation, such an interpretation was consistent with a clear international trend towards the establishment of joint organs to manage international watercourses. In this connection, one representative observed that draft article 26 established an obligation which was widely honoured in practice by watercourse States. He added that consultations were the best way of ensuring appropriate management and protection of the watercourse and could not be effective without a legal framework for cooperation. Also in support of the article, it was pointed out that the obligation to enter into consultations did not necessarily involve the obligation to achieve some result and was not entirely the same as the obligation to negotiate, inasmuch as consultation did not necessarily lead to negotiation. In order to make the text of paragraph 1 more flexible, the suggestion was made to replace "shall" by "should".

329. Still other representatives felt that the obligation enunciated in draft article 26 should be reinforced. Thus it was said that, in addition to the requirement for consultation and cooperation among watercourse States, there should be an obligation, in the event of conflicts among the socio-economic interests of watercourse States, to negotiate in order to arrive at a just and equitable solution.

330. Another aspect of the article which gave rise to divergent views concerned its implications as regards national sovereignty. One representative took the view that inasmuch as environmental concerns extended well beyond the area of national jurisdiction and affected other States, it appeared highly desirable to involve all other States which might have an interest in the activities provided for. He recognized that the relationship between members of future joint management committees should be based on consultations, since the establishment of a set of obligations and legally binding decisions by committees could deter States from becoming parties to the future instrument.

331. The view was on the other hand expressed that, given the current status of international law with respect to national sovereignty, it was hard to imagine - unless all the States concerned agreed - that a State could be compelled to accept a role by a third State in the management of a portion of a watercourse on its own territory. At most, it was stated, consultations could be sought among the riparian States of a particular watercourse to solve common problems pertaining to its management, but only if all the States concerned agreed to the consultation and not on the basis of a unilateral request. In this connection two suggestions were made: one sought to add an element of objective evaluation and the other to delete the phrase "at the request of any of them".

332. Comments of a more specific nature related to the phrase "joint organization", to the definition of "management" and to the structure of the article.

333. On the first point, it was suggested that the term "joint commission" should be used. Another proposal was to refer to the concept of a joint institutional mechanism, which was viewed as more flexible than that of an organization.

334. On the second point, it was suggested to provide a concise definition of the term "management" in lieu of a list of functions. While endorsing that approach, one representative said that as long as there was a list, he supported the inclusion of functions which were of particular importance to developing countries. As regards the list appearing in the text under consideration, the precise scope of paragraph 2 (a) was viewed by one representative as unclear. Another representative stated that subparagraph (b) might state what type of information and data should be exchanged among States; subparagraph (d) should be clarified, particularly the term "multi-purpose"; the reference in subparagraph (e) to "proposing ... decisions of the watercourse States" should be clarified; and subparagraph (f) could envisage clean-up and environmental protection measures and human health. Still another representative felt that the regulation of watercourses should occupy a prominent place among the duties of the organizations responsible for managing an international watercourse.

335. As regards the structure of the article, various suggestions were made. One of them was prompted by what was termed a "confusion" between the concept of "management" and that of "joint organization" for its management. In order to dispel the impression given by the current wording that "management" would consist of carrying out the functions which were in fact meant for the joint organization intended to provide for management, it was suggested that the first sentence of paragraph 2 should be deleted, that paragraph 1 should be reformulated as follows:

> "Watercourse States shall enter into consultations, at the request of any of them, concerning the establishment of an organization or a joint institutional mechanism for the management of an international watercourse [system], as follows:"

and that the management functions to be carried out by such an organization or institutional mechanism should then be enumerated.

336. Another proposal was to replace the chapeau of paragraph 2 by the words: "The functions of the joint organization shall be, inter alia, the following", to delete the chapeau of paragraph 3 and to add subparagraphs (a) and (b) of paragraph 3 to the indicative list of functions appearing in paragraph 2.

337. Other comments included the remark that some concepts presented by previous Special Rapporteurs should be taken up again (such as the idea that draft article 26 should be applicable, where necessary, to existing institutional mechanisms so as to strengthen them, a point on which, one representative observed, a decision had yet to be taken), as well as the observation that draft article 26 should establish a link between the agreement which must obviously be concluded in order to establish the joint mechanism and the so-called watercourse system agreements to which the initial draft articles referred.

Article 27. Protection of water resources and installations

338. A number of representatives agreed with the general thrust of the draft article. Some, however, felt that it could be improved. Comments focused on the scope of the draft article and on the extent of the obligations enunciated therein.

339. As regards the first point, some representatives felt that the draft article rightly encompassed water resources in addition to installations, pointing out in particular that the protection of water resources was closely connected with the problems of preventing pollution. Others, however, suggested that the emphasis should be on the protection of watercourses and that related institutions, facilities or other works should be dealt with in a separate article. Still others took the view that the draft article should be limited to the protection of installations since the protection of water resources was indistinguishable from the protection of watercourses, which was the very object of the draft and was contemplated in several provisions. One representative said that more studies were needed on the scope of the provision.

340. On the extent of the obligations enunciated in the draft article, one representative emphasized the need to properly balance States' obligations and rights, adding that the construction of works must not constitute a threat to downstream States.

341. The obligation to enter into consultations provided for in paragraph 2 gave rise to reservations on the part of some representatives. One of them pointed out that paragraph 2 might enable a riparian State to abuse its position by attempting to use the proposed consultations as an excuse to monitor or even intervene in the activities of a neighbouring State with respect to the management of portions of a watercourse on the neighbour's territory. Another felt that more studies were needed on the question as to whether consultations should be mandatory or optional.

342. Several representatives, on the other hand, felt that the obligations provided for in the draft article should be reinforced. One of them said that, instead of merely asking watercourse States to enter into consultations with a view to concluding agreements or arrangements concerning the establishment of safety standards and security measures for the protection of international watercourses and related installations, facilities and other works from hazards and dangers due to the forces of nature, or to wilful or negligent acts, paragraph 2 should make it obligatory for such States to use their best attempts to ensure that protection. He added that the article should provide for an obligation to prohibit not only the contamination of water resources but also any attempts to cut off the water supply of other watercourse States, to dry up springs or to divert rivers from their courses. Such acts, whether wilful or negligent, should involve the strict liability of the State. Another view was that the article should provide for an obligation to negotiate agreements or arrangements. In this connection, one representative remarked that the draft article merely called on States to enter into "consultations" with a view to concluding agreements or arrangements concerning safety standards and security measures for the protection of international watercourses and related installations. In the opinion of his delegation, the duty of watercourse States to do all that was possible to maintain and protect international watercourses and related installations, facilities and other works from natural hazards and risks or from wilful or negligent acts should be clearly established.

343. Other comments included the remark that it had yet to be decided how the draft article would apply to existing installations and the observation that the title

should refer to the setting up, operation and maintenance of installations so as to better correspond to the content of the article. In paragraph 1, one representative favoured the insertion of a reference to the principle of territorial integrity and that of sovereignty. Another representative suggested replacing the words "shall employ their best efforts to" by the words "shall take all possible measures to". As regards paragraph 2 (b), it was suggested that the reference to "international watercourses" be deleted.

Article 28. Status of international watercourses and water installations in time of armed conflict

344. The remark was made that the article dealt with two different issues, namely, the question of the use exclusively for peaceful purposes of international watercourses and related installations and the status of such watercourses and installations in time of armed conflict. It was suggested that those two aspects be dealt with in separate provisions.

345. The few speakers who commented on the first aspect generally endorsed the principle that international watercourses and related installations should be used exclusively for peaceful purposes. One of them did so with the proviso that the principles of protection and preservation of resources be regarded as included.

346. As regards the second aspect, divergent views were expressed. Some delegations questioned the appropriateness of dealing in the draft articles with problems relating to armed conflicts. Reference was made in this context to the risk of interference with legal provisions governing armed conflicts and even with other studies by the Commission itself, such as the draft Code of Crimes against the Peace and Security of Mankind. It was also said that what was termed "the delicate theme" of armed conflict was beyond the scope of the draft articles and that it would be better to deal with that issue in the context of the rules governing the conduct of States in time of armed conflict: such rules would apply to watercourses and to watercourse installations without any need for special provisions in the draft article under consideration.

347. Other representatives, although not opposing this aspect of draft article 28, felt that there was a need for further reflection as to how the article related to existing rules of international law on armed conflict. It was noted in this connection that the text proposed by the Special Rapporteur went beyond the requirements of general international law and the relevant provisions of the two Protocols to the 1949 Geneva Conventions. The suggestion was made in this context that consistency with existing law could be achieved through a reference, in the text of the draft article or in the preamble, to the rules of international law governing armed conflicts. Some representatives felt that the article should contain certain definitions mentioned in paragraph 297 of the report, such as poisoning of water resources and the diversion of rivers from their courses. One of them supported unreservedly the view that article 28 should prohibit not only the contamination of watercourses, but also any activity designed to cut off an enemy's water supply, the result being that not only contamination, but also drying up and diverting watercourses would be prohibited. In his opinion, all those

activities were both war crimes and crimes against humanity. After pointing out that the provisions concerned were designed to protect the civilian population against the harm occasioned by armed conflicts, and were concordant with Additional Protocol I to the 1949 Geneva Conventions, and in particular with the provisions therein regarding protection of objects indispensable to the survival of the civilian population, such as drinking-water supplies and irrigation works, he remarked that the concept of inviolability of watercourses and their associated installations reflected humanitarian considerations. As regards the question whether immunity should be waived when those objects served directly to support a military operation, he advocated the absolute immunity of watercourses, in view of the extreme difficulty of distinguishing between civilian and military use. He held the same view in relation to dikes and dams which, in his opinion, should be protected even when they served to support military operations, because of the pernicious effects of their destruction on the civilian population.

348. The term "inviolable" was viewed as inappropriate by many representatives, irrespective of their position on the substance of the provision.

Annex I. Implementation of the draft articles

349. Some representatives generally considered the proposed annex as positive and useful. One of them said that the eight articles contained in the annex were generally to the point and could arouse no objection. Some also remarked that the provisions of the annex stressed what was essential for the establishment of a non-discriminatory private-remedies system and reflected existing texts.

350. Other representatives questioned the need for such an annex in a framework agreement. One of them remarked that in most instances the instrument under preparation would be implemented through separate agreements tailored to the needs of specific watercourses, and would be implemented directly only residually. In his view, therefore, most of the proposed provisions seemed unnecessary. Another representative wondered whether it was really appropriate to include in a framework agreement an annex designed to facilitate the application of the draft articles. That, he said, might involve a contradiction.

351. Still other representatives felt that the annex required further study and thought, and should be substantially amended. The proposed text was described as "unclear", "lacking in consistency" and "giving rise to many problems". More specifically, the view was expressed that the provisions in the annex had introduced certain concepts and rules that were, as one representative put it, "disputable in international law" or, in the words of another representative, "contentious and unorthodox in both nature and content". Emphasis was placed upon the need to harmonize the approach reflected in the current text with States' liability with fault and liability without fault and to take due account of national laws. In this connection, many of the representatives in question felt that in its current form the annex could require changes in national legislation and went, as such, beyond the limits of a framework agreement.

352. In the light of the above, several representatives noted with satisfaction that the Special Rapporteur had concluded that the annex was not yet ripe for referral to the Drafting Committee and had reserved the possibility of submitting new proposals regarding the annex at the next session. One of those representatives urged the Special Rapporteur not to insist on submitting the proposals set out in the annex once again, as that would only hinder progress on consideration of the topic. Others suggested that consideration of specific articles on the matter be deferred until after completion of the work on the remainder of the draft articles or until after the contents of the obligations of each State for relief to individuals who suffered damage had been thoroughly examined.

353. The trends identified in paragraphs 349 to 351 above were also discernible as regards the general approach reflected in the annex.

354. Some representatives endorsed that general approach. One of them said that his delegation strongly favoured the idea of enabling private enterprises to obtain compensation for any harm that had been suffered, without involving the watercourse States in the dispute. In his view, it was sensible to ensure access by those enterprises to the courts of all the watercourse States, thereby avoiding the necessity for small enterprises to have recourse to diplomatic procedures. The remark was made that there were several advantages to domestic procedures at the private level: they were usually less costly; they involved the individuals and companies actually engaged in the relevant activities; they provided a more effective incentive to comply with the rules; in certain cases they were faster than diplomatic channels; they led to legally binding and enforceable determinations of the relevant parties' obligations; and they encouraged regional cooperation in the management of the particular watercourse system.

355. Support was expressed for the three central ideas underlying the proposed text, namely, first, the principle that watercourse States should attach the same importance to possible adverse effects on other States of activities in their territories as to such effects in their own territory; second, the equal treatment of natural or juridical persons in other States and of those in the watercourse States of origin in respect of the prevention of and information on possible hazards as well as compensation where damage had actually occurred; and third, the strengthening of the position of private persons in exercising those rights. The remark was made that those principles were consistent with current trends in environmental policy and were increasingly being incorporated into international instruments designed to protect the rights of the individual against transboundary hazards. In this connection some representatives noted that in drawing up the annex the Special Rapporteur had used as a source of inspiration the Nordic Convention of 1974 on the Protection of the Environment and had used the experience gained at the regional level, especially within the framework of the Organisation for Economic Cooperation and Development (OECD), in tackling problems relating to transboundary pollution.

356. Of those representatives generally favouring the proposed annex, some felt that the current text required further examination. One of them pointed out that the approach suggested would involve a reform of the judicial systems, which would

not be readily acceptable. He furthermore expressed serious reservations as to whether ordinary courts were in a position to apply international law on liability in settling such disputes. Consequently, he went on to say, it would be desirable to continue to study the potential effects of application of such a criterion on the functioning of States' jurisdictional systems, particularly where States did not have a sufficient number of suitable officials.

357. On the other hand, the philosophy underlying the annex was objected to by one representative who said that it was quite inconceivable to make a State seek in the courts of another State reparation and compensation in respect of harm originating in that other State and that to so exclude a dispute from the domain of international law and place it under municipal law was tantamount to vitiating the principle of the international legal liability of the State and to contradicting international practice in that field. In his view, such disputes should be settled directly between the States concerned through the peaceful, diplomatic and arbitral means available under international law.

358. A third line of thinking as regards the idea underlying the annex was one of scepticism. It was noted that the proposed text raised a problem of far-reaching implications, the problem of civil liability which was currently under scrutiny in many contexts, notably in connection with the Basel Convention on hazardous wastes and the proposed IMO Convention on carriage of hazardous and noxious substances, as well as in the framework of other topics under consideration by the Commission itself. It was also remarked that, although the Standing Committee of the International Atomic Energy Agency (IAEA) had examined in depth the relationship between civil and State liability regimes, no concrete proposal had as yet been made for a comprehensive system of compensation for nuclear damage based on a combination of the two regimes.

359. In the light of the difficulties referred to above, some representatives advocated a detailed analysis of the relationship between claims for compensation made by individuals and those made by States and a study of the constitutional issues which the proposed annex would pose for the States concerned. Another suggestion was to dispense with provisions concerning the legal consequences of harm or, alternatively, to include a single provision stating the principles of non-discrimination and equal right of access.

360. Drafting comments relating to the annex as a whole included the remark that the title did not clearly reflect the content of the text and the observation that terms should be used consistently and be defined in the article on use of terms. In this connection, it was pointed out that different expressions, such as "appreciable harm", "adverse effects" and "any harm ... or ... any environmental degradation" might refer to specific standards in the minds of the drafters, and, if so, they should be clarified.

361. Also referring to the need for consistent terminology, one representative noted with satisfaction that the word "appreciable" had been used in the various articles of the annex to qualify damage instead of the word "substantial". He added that the Commission had been correct to use that qualification in other draft articles, for example, in article 23, paragraph 2.

362. As regards draft article 1, some representatives said they had no objection to its wording. One representative, however, stressed that although the text might be appropriate from a purely legal point of view it was inappropriate from a geographical and biological point of view. He suggested considering a definition that did not necessarily depend on the concept of either real or potential appreciable harm. Other comments included the remark that the use of the expression "watercourse State of origin" was questionable and the suggestion that the definition contained in the draft article could be incorporated in the article on the use of terms.

363. Some representatives supported the non-discrimination principle reflected in draft article 2. Others felt that the provision did not embody an acceptable principle. One of them, after observing that the draft article would mean that a nuisance in a downstream State would be equated with a nuisance in an upstream State, said that as long as the rules of liability for tortious acts were not internationally uniform and as long as the rules of procedure and evidence differed from country to country, it was not possible to establish a rule such as the one contained in draft article 2. Another representative, after observing that draft article 2 erred in referring to non-discrimination, since its provisions related, rather, to the principle of reciprocity, expressed the view that, in any event, the text gave the impression that the so-called State of origin could unilaterally consider the permissibility of proposed, planned or existing activities. He pointed out that since the articles provisionally adopted by the Commission placed obligations on States to act or not to act, including with regard to protection and preservation, the provision should in any event oblige States to refrain from undertaking any activities which might cause injurious effects in other watercourse States.

364. Other comments included the remark that the draft article went far beyond the scope of a framework agreement, the observation that it needed to be reformulated in simpler and clearer terms and the suggestion that such a provision belonged in the part on planned measures.

365. Several representatives generally supported draft article 3, one of them calling for a simpler and clearer formulation and another suggesting that it be included in the part of the draft entitled "General principles" . The view was however expressed that the article went far beyond the scope of a framework agreement and would require changes in national laws and procedures as regards the course of action and forum of suit. Criticisms were addressed particularly to paragraph 2. One representative suggested that the paragraph be deleted or amended since it contained a clause which had nothing to do with the draft articles, namely, the invitation to States to cooperate in the development of international law relating to responsibility and liability. Another representative, after observing that the paragraph sought to impose a duty to cooperate in the implementation of existing international law, said that, while such international cooperation was desirable, the question arose as to whether such a provision in a legal text added anything useful to existing obligations and whether it was realistic to establish an open-ended obligation to cooperate. He noted that paragraph 2 adopted a cautious approach to the development of specific procedures for payment of compensation, such as compulsory insurance or compensation funds,

and concluded that, given the considerable resources needed for the establishment of such schemes, it might be better to omit paragraph 2 entirely.

366. Some representatives expressed readiness to support the idea of equal right of access embodied in draft article 4. One of them suggested that the wording be simplified and clarified, and another favoured the inclusion of the provision in the part of the draft devoted to general principles. Other representatives criticized the proposed text. One of them felt that the article did not embody an acceptable principle, and another encouraged the Commission to take note of the recently negotiated ECE Convention on assessment of environmental impacts in the transboundary context, and in particular the language used in that Convention in dealing with the subject of civil liability.

367. One representative asked whether paragraph 2 of the draft article did not place obligations on future contracting States which were too extensive and too difficult to define. While acknowledging that individuals who might potentially be affected would understandably wish to be involved in the preparation in other States of decisions designed to avoid hazards, he stressed that a legal claim to be involved similar to that granted by the national law of other States to their own national organizations would place a great strain on such procedures. He further pointed out that the provisions proposed by the Special Rapporteur were virgin territory for many States and that the national legislation and different legal traditions of member States suggested that it might be possible to reach agreement only on the lowest common denominator, especially as regards the status of private individuals.

368. Some representatives supported draft article 5, one of them suggesting that it be placed in the part of the draft on planned measures. On the other hand, another representative felt that the article did not embody an acceptable obligation, and still another feared that the provision might be placing obligations on future contracting States that were too extensive and too difficult to define.

369. Draft article 6 was viewed as unobjectionable by one representative, but a number of other representatives favoured its deletion. The remark was made in this connection that its subject matter should be dealt with in the context of the topic "Jurisdictional immunities of States and their property". It was also said that a provision of this nature went too far and had no place in a framework agreement.

370. Most of the representatives who commented on draft article 7 felt that such a provision had no place in a framework agreement. One representative stressed in particular that it was difficult to see how all the parties to the future instrument could participate directly in the application of the instrument to a particular watercourse. He remarked in this connection that the conventions mentioned by the Special Rapporteur as containing provisions for a conference of the parties were not framework conventions comparable to the draft articles. Another representative said that a rather cumbersome machinery was not needed in order to review implementation, and some representatives expressed serious doubts as to the practicability of convening a conference of the parties within two years of the entry into force of the future instrument. In any case, three representatives observed, a provision along the lines of draft article 7 belonged in the part of the future instrument devoted to final clauses.